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LAW IN GENERAL
PERSONAL RIGHTS
PROPERTY
WILLS
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PREFACE

Encouraged by our success in the preparation of educational courses for home study in engineering and the applied sciences, we present in these pages a course of instruction for home study in the rules and principles of law that govern the most important business relations. These volumes contain the Instruction Papers and Examination Questions of a thorough course in Commercial Law for merchants, bankers, and business men generally, and those in their employ; also for notaries public, justices of the peace, and all others who may require such knowledge. The principles of law applicable to contracts, the domestic relations, trusts, the administration of estates, agency, bailment, and all other important topics are clearly and concisely covered. These textbooks are better suited for the study of Commercial Law by the business classes and those holding official positions who have not had a training in the law, but require a knowledge of its applications to intelligently and satisfactorily perform their duties, than any other publication as yet issued for this purpose, and will also be of great value to law students who are preparing to practice law.

The volumes are six in number. The first four contain the principles as comprised in the Instruction Papers of the Course, arranged in accordance with the method adopted for teaching all of our Courses. Another volume is an Appendix, wherein is given a digest of the statute laws of various jurisdictions relative to the topics treated in the first four books. There is also a Book of Forms, which is devoted to showing the manner of constructing the various instruments useful in general business and conveyancing.

The sources of our data are the usual standard works of the law and the reports of decided cases, the compilation being made by able writers who have been occupied in the labor for several years. In the preparation of the text, care has been taken to eliminate technicalities and to present principles and their application so that they may be readily mastered by those who have but limited time for study.

The method of numbering the pages and articles is such that each paper and part is complete in itself. Hence, in order to make the indexes intelligible, a number is given to each section or part as well as to each page. This number is placed at the top of each page, on the headline, opposite the page number; and to distinguish it from the page number, it is preceded by the section mark (§). Consequently, a reference such as § 18, page 29, would be readily found as follows: Look along the inside edges of the headlines until § 18 is found, and then through § 18 until page 29 is found.

INTERNATIONAL CORRESPONDENCE SCHOOLS.

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ABBREVIATIONS

This list embodies the abbreviated designations of the citations used throughout the Course, so arranged as to enable the student to ascertain the full titles of the text-books and law reports to which reference is made.

A. C.	Law Reports, Appeal Cases, English Court of Appeal.
(*1893*) *A. C.* . .	Appeal Cases, 1893, English Court of Appeal.
(*1896*) *A. C.* . .	Appeal Cases, 1896, English Court of Appeal.
A. K. Marsh. . .	A. K. Marshall's Reports, Kentucky.
A. & E.	Adolphus and Ellis's Reports, English King's Bench.
Ab. Pr., or *Abb. Pr.*	Abbott's Practice Reports, New York Courts.
Ab. Sh.	Abbott on Shipping.
Abb.	Abbott's Reports, United States Circuit and District Courts.
Abb. N. C., *Abb. N. Cas.*, or *Abb. New Cas.*	Abbott's New Cases, New York Courts.
Abb. Pr. N. S. . .	Abbott's Practice Reports, New Series, New York Courts.
Abb. Trial Ev. . .	Abbott's Trial Evidence.
Ad. Eq.	Adam's Equity.
Ad. & E., *Ad. & El.*, or *Ad. & Ell.*	Adolphus and Ellis's Reports, English King's Bench.
Ad. & Ell. N. S.	Adolphus and Ellis's Reports, New Series, English Queen's Bench.
Addams	Addams's Reports, English Ecclesiastical Courts.
Add.	Addison's Reports, Pennsylvania.
Add. Cont.	Addison on Contracts.
Aik.	Aiken's Reports, Vermont.
Ala.	Alabama Reports.
Ala. N. S.	Alabama Reports, New Series (Alabama Reports Proper).

Albany L. J. . . .	Albany Law Journal.
Aleyn	Aleyn's Select Cases, English King's Bench.
Allen	Allen's Reports, Massachusetts Reports, Vols. 83–96.
Am. B. R.	American Bankruptcy Reports.
Am. Dec.	American Decisions.
Am. Dig.	American Digest.
Am. L. Reg., or *Am. Law Reg.*	American Law Register, Philadelphia.
Am. Law Reg. N. S.	American Law Register, New Series, Philadelphia.
Am. Law Reg. & Rev.	American Law Register and Review, Philadelphia.
Am. Law Rev. . .	American Law Review, Boston.
Am. R., or *Am. Rep.*	American Reports.
Am. St. Rep. . . .	American State Reports.
Am. & Eng. Corp. Cas.	American and English Corporation Cases.
Am. & Eng. Encyc. Law	American and English Encyclopedia of Law.
Am. & Eng. R. Cas.	American and English Railroad Cases.
Amb.	Ambler's Reports, English Chancery.
And. Law Dict. .	Anderson's Law Dictionary.
Ang. Car.	Angell on Carriers.
Ang. Lim.	Angell on Limitations.
Ang. Watercourses.	Angell on Watercourses.
Ang. & A. Corp. .	Angell and Ames on Corporations.
Ans. Cont.	Anson on Contracts.
App. Cas.	Law Reports, English Appeal Cases.
App. Cas. (*D. C.*)	Appeal Cases, District of Columbia.
App. Div. (*N. Y.*)	Appellate Division Reports, New York Supreme Court.
Archbold Cr. Pl. .	Archbold's Criminal Pleading, Procedure and Evidence.
Ark.	Arkansas Reports.
Ark. Dig. Stat. .	Arkansas Digest of Statutes.
Arn. Mar. Ins. . .	Arnold on Marine Insurance.
Ashm.	Ashmead's Reports, Pennsylvania.
Atk.	Atkyn's Reports, English Chancery.
Atl. Rep.	Atlantic Reporter.
B. Mon., or *B. Monr.*	B. Monroe's Reports, Kentucky.
B. & A.	Barnewall and Alderson's Reports, English King's Bench.

B. & Ad.	Barnewall and Adolphus's Reports, English King's Bench.
B. & Ald.	Barnewall and Alderson's Reports, English King's Bench.
B. & B.	Broderip and Bingham's Reports, English Common Pleas.
B. & C.	Barnewall and Cresswell's Reports, English King's Bench.
B. & D.	Benloe and Dalison's Reports, English Common Pleas.
B. & F.	Broderick and Fremantle's Reports, English Ecclesiastical Courts.
B. & P.	Bosanquet and Puller's Reports, English Common Pleas.
B. & S.	Best and Smith's Reports, English Queen's Bench.
Bac. Abr.	Bacon's Abridgment.
Bacon's Ben. Soc. .	Bacon on Beneficial Societies.
Bailey	Bailey's Law Reports, South Carolina.
Ball. Com. Prop. .	Ballinger on Community Property.
Barb.	Barbour's Reports, New York Supreme Court.
Barb. Ch.	Barbour's Chancery Reports, New York.
Barn. & Ald. . .	Barnewall and Alderson's Reports, English King's Bench.
Barr. & Ad. M. & M.	Barringer and Adams's Law of Mines and Mining in the United States.
Bates Part.	Bates on Partnership.
Bay	Bay's Reports, South Carolina.
Bayl. Bill	Bayley on Bills.
Bann. & Ard. Pat. Cas.	Banning and Arden's Patent Cases.
Baxt.	Baxter's Reports, Tennessee Supreme Court, Vols. 1–9.
Beach Cont. . . .	Beach on Contracts.
Beach Ins.	Beach's Law of Insurance.
Beach Mod. Eq. Jur.	Beach on Modern Equity Jurisprudence.
Beach Priv. Corp. .	Beach on Private Corporations.
Beas. Ch.	Beasley's Reports, New Jersey Equity Reports, Vols. 12–13.
Beav.	Beavan's Reports, English Rolls Court.
Ben.	Benedict's Reports, United States District Court, Second Circuit.
Benj. Sales	Benjamin on Sales.
Bibb	Bibb's Reports, Kentucky.
Big. Law B. N. & C.	Bigelow on the Law of Bills, Notes, and Checks.

Big. Life and Acc. Ins. Cas.	Bigelow's Life and Accident Insurance Cases.
Bing.	Bingham's Reports, English Common Pleas.
Bing. Inf. & Cov.	Bingham on Infancy and Coverture.
Bing. N. C.	Bingham's New Cases, English Common Pleas.
Binn.	Binney's Reports, Pennsylvania.
Bish. Cont.	Bishop on Contracts.
Bish. Crim. Law	Bishop on Criminal Law.
Bish. Ins. Debt.	Bishop on Insolvent Debtors.
Bish. M. & D.	Bishop on Marriage and Divorce.
Bish. New Cr. Proc.	Bishop's New Criminal Procedure.
Bisph. Eq.	Bispham's Principles of Equity.
Biss.	Bissell's Reports, United States Circuit Court, Seventh Circuit.
Black (*Ind.*)	Black's Reports, Indiana Reports, Vols. 30–53.
Black. (*Ind.*)	Blackford's Reports, Indiana.
Black (*U. S.*)	Black's Reports, United States Supreme Court.
Black. Comm.	Blackstone's Commentaries.
Black. S., or *Blackb. S.*	Blackburn on Sales.
Blackf.	Blackford's Reports, Indiana.
Bland	Bland's Reports, Maryland Chancery.
Blatch., or *Blatchf.*	Blatchford's Reports, United States Circuit Court, Second Circuit.
Bliss Life Ins.	Bliss on Life Insurance.
Boisot Mech. Liens	Boisot on Mechanics' Liens.
Bos. & P.	Bosanquet and Puller's Reports, English Common Pleas.
Bosw.	Bosworth's Reports, New York City Superior Court Reports, Vols. 14–23.
Bouv. Inst.	Bouvier's Institutes of American Law.
Bouv. Law Dict.	Bouvier's Law Dictionary.
Brad. (*Ill.*)	Bradwell's Reports, Illinois.
Bradb. Dist.	Bradbey on Distress.
Bradf.	Bradford's Reports, New York Surrogate Courts.
Brandt Sur. & Guar.	Brandt on Suretyship and Guaranty.
Brett L. Cas. Mod. Eq.	Brett's Leading Cases in Modern Equity.
Brev.	Brevard's Reports, South Carolina.
Brew., or *Brewst.*	Brewster's Reports, Pennsylvania.
Bro. (*Pa.*)	Browne's Reports, Pennsylvania.
Bro. Ch. or *Bro. Ch. Cas.*	Brown's Chancery Cases, English.
Bro. Leg. Max.	Broom's Legal Maxims.
Bro. P. C.	Brown's Parliamentary Cases, English.

Bro. St. Fr. . . .	Brown on the Statute of Frauds.
Brock.	Brockenborough's Reports, C. J. Marshall's Decisions, United States Circuit Court, Fourth Circuit.
Brooke Not. . . .	Brooke on the Office of a Notary in England.
Broom Leg. Max.	Broom's Legal Maxims.
Bulst.	Bulstrode's Reports, English King's Bench.
Bur., or *Burr.* . .	Burrow's Reports, English King's Bench.
Burr. Ass.	Burrill on Assignments.
Burt. R. P. . . .	Burton on Real Property.
Bush	Bush's Reports, Kentucky.
C. A.	Court of Appeal, English Supreme Court.
C. B.	Common Bench Reports, English, by Manning, Granger, and Scott.
C. B. N. S. . . .	Common Bench Reports, New Series, English.
C. M. & R. . . .	Crompton, Meeson, and Roscoe's Reports, English Exchequer.
C. P. D., or *C. P. Div.*	Law Reports, Common Pleas Division, English Supreme Court of Judicature.
C. & J.	Crompton and Jervis's Reports, English Exchequer.
C. & K.	Carrington and Kirwan's Reports, English Nisi Prius.
C. & M.	Crompton and Meeson's Reports, English Exchequer.
C. & P.	Carrington and Payne's Reports, English Nisi Prius.
Cai. Cas.	Caine's Cases, Court of Errors, New York.
Cal.	California Reports.
Camp. or *Campb.* .	Campbell's Reports, English Nisi Prius.
Can. B. of E. Act	Canadian Bills of Exchange Act.
Can. L. J.	Canada Law Journal, Toronto.
Car. & Kin. . . .	Carrington and Kirwan's Reports, English Nisi Prius.
Car. & P.	Carrington and Payne's Reports, English Nisi Prius.
Cent. Dict.	Century Dictionary.
Cent. Rep.	Central Reporter.
Centr. L. J. . . .	Central Law Journal, St. Louis, Mo.
Ch.	Law Reports, English Chancery Appeals.
(*1891*) *Ch.*	Law Reports, Chancery Division, 1891, English Supreme Court.
(*1892*) *Ch.*	Law Reports, Chancery Division, 1892, English Supreme Court.

(*1893*) *Ch.*	Law Reports, Chancery Division, 1893, English Supreme Court.
(*1894*) *Ch.*	Law Reports, Chancery Division, 1894, English Supreme Court.
(*1895*) *Ch.*	Law Reports, Chancery Division, 1895, English Supreme Court.
(*1898*) *Ch.*	Law Reports, Chancery Division, 1898, English Supreme Court.
Ch. App., or *Ch. App. Cas.* . . .	Law Reports, English Chancery Appeal Cases.
Ch. Cas.	Cases in Chancery, English.
Ch. D., or *Ch. Div.*	Law Reports, Chancery Division, English Supreme Court of Judicature.
Chal. Dig. Eng. B. of E. Act . .	Chalmers Digest of the English Bills of Exchange Act.
Chandl.	Chandler's Reports, Wisconsin.
Charlt., T. U. P. .	T. U. P. Charlton's Reports, Georgia.
Chev. Eq.	Cheves's Equity Reports, South Carolina.
Chit. Black. Comm.	Chitty's Blackstone's Commentaries.
Chit. Bills	Chitty on Bills.
Chit. Cont.	Chitty on Contracts.
Chit. Prer.	Chitty on Prerogatives of the Crown.
Chitty Pr.	Chitty on General Practice.
Cin. Law Bul. . .	Cincinnati Law Bulletin, Cincinnati, Ohio.
Civ. Pro., or *Civ. Pro. R.*	Civil Procedure Reports, New York.
Cl. & F., or *Cl. & Fin.*	Clark and Finnelly's Reports, English House of Lords Cases.
Clark (*Pa.*) . . .	Clark's Pennsylvania Law Journal Reports.
Cliff.	Clifford's Reports, United States Circuit Court, First Circuit.
Co.	Coke's Reports, English King's Bench.
Co. Inst.	Coke's Institutes.
Co. Litt.	Coke on Littleton.
Co. R., or *Co. Rep.*	Coke's Reports, English King's Bench.
Code Civ. Pro. . .	Code of Civil Procedure.
Code Nap.	Code Napoleon, or Civil Code.
Coke	Coke's Reports, English King's Bench.
Coke Litt.	Coke on Littleton.
Col. App.	Colorado Appellate Reports.
Coldw.	Coldwell's Reports, Tennessee.
Colo.	Colorado Reports.
Colo. App.	Colorado Appellate Reports.
Com. Cont. . . .	Comyn on Contracts.

Comst.	Comstock's Reports, New York Court of Appeals Reports, Vols. 1-4.
Conn.	Connecticut Reports.
Const. U. S.	Constitution of the United States.
Cook	Cook on Corporations.
Cook Stock, etc.	Cook on Stock and Stockholders.
Cooley Const. L.	Cooley's Principles of Constitutional Law.
Cooley Const. Lim.	Cooley on Constitutional Limitations.
Cowen	Cowen's Reports, New York Supreme Court.
Cowp.	Cowper's Reports, English King's Bench.
Cox Cr. Cas.	Cox's Criminal Cases, English.
Cr.	Cranch's Reports, United States Supreme Court.
Cr. C. C.	Cranch's Reports, United States Circuit Court, District of Columbia.
Cr. & M.	Crompton and Meeson's Reports, English Exchequer.
Cranch	Cranch's Reports, United States Supreme Court.
Cro. Eliz.	Croke's Reports *temp.* Elizabeth (1 Croke).
Cromp. & M.	Crompton and Meeson's Reports, English Exchequer.
Cruise Dig.	Cruise's Digest of the Law of Real Property.
Ct. of Cl.	Court of Claims Reports, United States.
Curt.	Curtis on Copyright.
Curt. Ecc.	Curtis's Reports, English Ecclesiastical Courts.
Curt. Pat.	Curtis on Patents.
Cush.	Cushing's Reports, Massachusetts Reports, Vols. 55–66.
D. C.	District of Columbia Reports.
D. Chip.	D. Chipman's Reports, Vermont.
D. F. & J.	De Gex, Fisher, and Jones's Reports, English Chancery.
D. J. & S.	De Gex, Jones, and Smith's Reports, English Chancery.
D. & Chit.	Deacon and Chitty's English Bankruptcy Cases.
D. & L.	Dowling and Lownde's Reports, English Practice Cases.
Dall.	Dallas's Reports, United States Supreme Court and Pennsylvania Courts.
Daly	Daly's Reports, New York Common Pleas.
Dan. Neg. Inst.	Daniel on Negotiable Instruments.
Dana	Dana's Reports, Kentucky.
Dav.	Davies's Reports, United States District Court for Maine.
Day	Day's Reports, Connecticut.
De Col. Guar.	De Collyar on Guaranty.

De G. F. & J. . .	De Gex, Fisher, and Jones's Reports, English Chancery.
De G. M. & G. .	De Gex, MacNaghten, and Gordon's Reports, English Chancery.
Del.	Delaware Reports.
Del. Ch.	Delaware Chancery Reports.
Del. Co. (*Pa.*) . .	Delaware County Court Reports, Pennsylvania.
Dem.	Demorest's Reports, New York.
Den., or *Denio* . .	Denio's Reports, New York.
Dev. L.	Devereux's Law Reports, North Carolina Reports, Vols. 12–15.
Dev. & B. L. . .	Devereux's and Battle's Law Reports, North Carolina Reports, Vols. 18–20.
Dial. Doct. & Stud.	Dialogues Between a Doctor of Divinity and a Student at Law, St. Germain, 1540.
Dill.	Dillon's Reports, United States Circuit Court Reports, Eighth Circuit.
Dill. Mun. Corp. .	Dillon on Municipal Corporations.
Dist. Rep. (*Pa.*) .	District Court Reports, Pennsylvania.
Dods.	Dodson's Reports, English Admiralty.
Doug. (*Eng.*), or *Dougl.* (*Eng.*) .	Douglas's Reports, English King's Bench.
Doug. (*Mich.*), or *Dougl.* (*Mich.*) .	Douglas's Reports, Michigan.
Dow	Dow's Cases, English House of Lords.
Dowl. & R. . . .	Dowling and Ryland's Reports, English King's Bench.
Drew.	Drewry's Reports, English Chancery.
Dru. & War. . .	Drury and Warren's Reports, Irish Chancery.
Duer	Duer's Reports, New York Superior Court Reports, Vols. 8–13.
Duer Mar. Ins. .	Duer on Marine Insurance.
Durnf. & E. . .	Durnford and East's Reports, English King's Bench (Term Reports).
Dutch.	Dutcher's Reports, New Jersey Law Reports, Vols. 25–29.
Dwar. St.	Dwarris on Statutes.
E. B. & E. . . .	Ellis, Blackburn, and Ellis's Reports, English Queen's Bench.
E. C. L.	English Common Law Reports (American Reprint).
E. D. S., or *E. D. Smith*	E. D. Smith's Reports, New York Common Pleas.
E. & B.	Ellis and Blackburn's Reports, English Queen's Bench.

E. & E.	Ellis and Ellis's Reports, English Queen's Bench
East	East's Reports, English King's Bench.
Edw. Bailm. . . .	Edwards on Bailments.
Edw. Bills	Edwards on Bills.
Edw. Ch.	Edwards's Chancery Reports, New York.
El. & B., or *El. & Bl.*	Ellis and Blackburn's Reports, English Queen's Bench.
El. & El.	Ellis and Ellis's Reports, English Queen's Bench.
Encyc. Brit. . . .	Encyclopedia Britannica.
Endl. Bldg. Assns.	Endlich on Building Associations.
Eng. B. of E. Act	English Bills of Exchange Act.
Eng. Ecc.	English Ecclesiastical Reports (American Reprint).
Eng. L. & Eq. .	English Law and Equity Reports.
Eng. M. W. Prop. Act	English Married Women's Property Act.
Esp., or *Esp. N. P.*	Espinasse's Reports, English Nisi Prius.
Eversley Dom. Rel.	Eversley on Domestic Relations.
Ex.	Exchequer Reports, English.
Ex. D.	Law Reports, Exchequer Division, English Supreme Court.
Exch.	Exchequer Reports, English.
F. & F.	Foster and Finalson's Reports, English Nisi Prius.
Fed. Cas.	Federal Cases.
Fed. R., or *Fed. Rep.*	Federal Reporter.
Fish. Pat. Cas. . .	Fisher's United States Patent Cases.
Fla.	Florida Reports.
Flipp.	Flippin's Reports, United States Circuit Courts.
Fras. Dom. Rel. .	Fraser on Personal and Domestic Relations.
Frost Guar. Ins. .	Frost on Guaranty Insurance.
Ga.	Georgia Reports.
Gall.	Gallison's Reports, United States Circuit Court, First Circuit.
Gemm. Div. . . .	Gemmill on Divorce in Canada.
Gilb. Dis.	Gilbert on Distress.
Gilb. Trusts . . .	Gilbert on Uses and Trusts.
Gill	Gill's Reports, Maryland.
Gill & J.	Gill and Johnson's Reports, Maryland.
Grant Cas.	Grant's Cases, Pennsylvania Supreme Court.
Grant Ch.	Grant's Chancery Reports, Ontario.
Grant Corp. . . .	Grant on Corporations.

Gratt.	Grattan's Reports, Virginia.
Gray	Gray's Reports, Massachusetts Reports, Vols. 67–82.
Green (*N. J.*) . . .	Green's Reports, New Jersey Law Reports, Vols. 13–15.
Greene (*Ia.*) . . .	Greene's Reports, Iowa.
Greenl.	Greenleaf's Reports, Maine Reports, Vols. 1–9.
Greenl. Ev. . . .	Greenleaf on Evidence.
H. Bl., or *H. Bla.*	Henry Blackstone's Reports, English Common Pleas and Exchequer Chamber.
H. L. C., or *H. L. Cas.*	House of Lords Cases, English.
H. & C.	Hurlstone and Coltman's Reports, English Exchequer.
H. & N.	Hurlstone and Norman's Reports, English Exchequer.
Hag.	Hagan's Reports, West Virginia Reports, Vols. 1–5.
Hagg., or *Hagg. Ecc.*	Haggard's Reports, English Ecclesiastical Reports.
Hagg. Adm. . . .	Haggard's Admiralty Reports, English.
Hagg. Con. . . .	Haggard's Consistorial Cases, English.
Hallam Const. Hist.	Hallam's Constitutional History.
Halst.	Halsted's Reports, New Jersey Law Reports, Vols. 6–12.
Har. & J.	Harris and Johnson's Reports, Maryland.
Hare	Hare's Reports, English Chancery.
Harr.	Harrington's Reports, Delaware.
Harr. & J. . . .	Harris and Johnson's Reports, Maryland.
Harr. & McH. .	Harris and McHenry's Reports, Maryland.
Hawaii	Hawaii Reports.
Hawks	Hawks's Reports, North Carolina Reports, Vols. 8–11.
Hayw.	Haywood's Reports, Tennessee.
Heard L. & Sl. .	Heard on Libel and Slander.
Heisk.	Heiskell's Reports, Tennessee.
Hen. Bla.	Henry Blackstone's Reports, English Common Pleas and Exchequer Chamber.
Hen. & M. . . .	Hening and Mumford's Reports, Tennessee.
Hill (*N. Y.*) . . .	Hill's Reports, New York Supreme Court.
Hill (*S. C.*) . . .	Hill's Law Reports, South Carolina.
Hill Ch., or *Hill Eq.*	Hill's Chancery Reports, South Carolina.
Hill Tr.	Hill on Trustees.

Hilt.	Hilton's Reports, New York Common Pleas.
Hollingsw. Cont. .	Hollingsworth on Contract.
Holm.	Holmes's Reports, United States Circuit Court.
Houst.	Houston's Reports, Delaware.
How. (*Miss.*) . .	Howard's Reports, Mississippi Reports, Vols. 2–8.
How. (*U. S.*) . .	Howard's Reports, United States Supreme Court.
How. Pr.	Howard's Practice Reports, New York.
Hugh., or *Hughes*	Hughes's Reports, United States Circuit Court, Fourth Circuit.
Hump., or *Humph.*	Humphrey's Reports, Tennessee.
Hun	Hun's Reports, New York Supreme Court.
Hurl. & Nor. . .	Hurlstone and Norman's Reports, English Exchequer.
Hutch. Car. . . .	Hutchinson on Carriers.
Ia.	Iowa Reports.
Ill.	Illinois Reports.
Ill. App.	Illinois Appellate Court Reports.
Ind.	Indiana Reports.
Ind. App.	Indiana Appellate Court Reports.
Inder. Com. L. . .	Indermaur's Principles of the Common Law.
Ins. L. J.	Insurance Law Journal, New York and St. Louis.
Ir. Ch.	Irish Chancery Reports.
Ir. L. (*N. C.*) . .	Iredell's Law Reports, North Carolina.
Ir. R. C. L. . . .	Irish Reports, Common Law Series.
Ired.	Iredell's Law Reports, North Carolina.
Ired. Eq.	Iredell's Equity Reports, North Carolina.
Ired. Law	Iredell's Law Reports, North Carolina.
Irish Rep. Q. B. & Ex. D.	Irish Reports, Queen's Bench and Exchequer Division.
J. J. Marsh. . . .	J. J. Marshall's Reports, Kentucky.
J. & La T. . . .	Jones and La Touche's Reports, Irish Chancery.
J. & W.	Jacob and Walker's Reports, English Chancery.
Jac. Law Dict. . .	Jacob's Law Dictionary.
Jarm. Wills . . .	Jarman on Wills.
John. (*Eng.*) . . .	Johnson's Reports, English Vice-Chancellor's Decisions.
Johns.	Johnson's Reports, New York Supreme Court.
Johns. Cas.	Johnson's Cases, New York Supreme Court.
Johns. Ch.	Johnson's Chancery Reports, New York.
Johns. Dict. . . .	Johnson's Dictionary.
Jon. (*N. C.*) . . .	Jones's Reports, North Carolina Law Reports.
Jon. Bailm. . . .	Jones on Bailments.

Jon. Chat. Mort. .	Jones on Chattel Mortgages.
Jon. Eq.	Jones's Equity Reports, North Carolina.
Jon. Liens	Jones on Liens.
Jon. Mort.	Jones on Mortgages.
Jon. Pledges . . .	Jones on Pledges.
Joyce Ins.	Joyce on Insurance.
Jur. N. S.	The Jurist, New Series, London.
Jurist	The Jurist, London, Reports in all the English Courts.
K. & J.	Kay and Johnson's Reports, English Chancery.
Kan., or *Kans.* . .	Kansas Reports.
Kans. App. . . .	Kansas Appellate Court Reports.
Kay and J., or *Kay & John.*	Kay and Johnson's Reports, English Chancery.
Kelly	Kelly's Reports, Georgia Reports, Vols. 1–3.
Kent's Comm. . .	Kent's Commentaries.
Kern.	Kernan's Reports, New York Court of Appeals Reports, Vols. 11–14.
Kerr Inj.	Kerr on Injunctions.
Keyes	Keyes's Reports, New York Court of Appeals.
Kulp	Kulp's Reports, Luzerne Legal Register, Pennsylvania.
Ky.	Kentucky Reports.
L. C. Jur.	Lower Canada Jurist, Montreal.
L. J. C. P.	Law Journal Reports, New Series, English Common Pleas.
L. J. Ch., or *L. J. Chan.*	Law Journal Reports, New Series, English Chancery.
L. J. Ex., or *L. J. Exch.*	Law Journal Reports, New Series, English Exchequer.
L. J. Mat. Cas. .	Law Journal Reports, New Series, English Matrimonial Cases.
L. J. P. M. & A.	Law Journal Reports, New Series, English Probate, Matrimonial, and Admiralty Cases.
L. J. Q. B. . . .	Law Journal Reports, New Series, English Queen's Bench.
L. J. Rep.	Law Journal, London, Reports in all English Courts.
L. R.	Law Reports, English.
L. R. A.	Lawyers' Reports Annotated.
L. R. App., or *L. R. App. Cas.* . .	Law Reports, English Appeal Cases.

L. R. C. P. . . .	Law Reports, English Common Pleas.
L. R. C. P. D. . .	Law Reports, Common Pleas Division, English Supreme Court of Judicature.
L. R. Ch., or *L. R. Ch. App.*	Law Reports, English Chancery Appeal Cases.
L. R. Ch. D. . .	Law Reports, Chancery Division, English Supreme Court.
L. R. Eq.	Law Reports, English Equity Cases.
L. R. Ex., or *L. R. Exch.*	Law Reports, English Exchequer.
L. R. Ex. D. . .	Law Reports, Exchequer Division, English Supreme Court of Judicature.
L. R. H. L. . . .	Law Reports, House of Lords, English and Irish Appeal Cases.
L. R. Ir.	Law Reports, Irish Cases.
L. R. P. C. . . .	Law Reports, Privy Council, English Appeal Cases.
L. R. P. Div. . .	Law Reports, Probate Division, English.
L. R. P. & D. . .	Law Reports, Probate and Divorce Cases, English.
L. R. Q. B. . . .	Law Reports, English Queen's Bench.
L. R. Q. B. D., or *L. R. Q. B. Div.*	Law Reports, Queen's Bench Division, English Supreme Court of Judicature.
L. Rep. Ann. . .	Lawyers' Reports Annotated.
L. T.	Law Times Reports, English Courts.
L. T. N. S., or *L. T. R. N. S.* . .	Law Times Reports, New Series, English Courts, with Irish and Scotch Cases.
L. & E.	English Law and Equity Reports, Boston Edition.
La.	Louisiana Reports, Supreme Court.
La. Ann.	Louisiana Annual Reports, Supreme Court.
La. Civ. Code . .	Louisiana Civil Code.
Lal. R. P.	Lalor on Real Property.
Lanc. L. Rev., or *Lanc. Law Rev.*	Lancaster Law Review, Lancaster, Pa.
Lans.	Lansing's Reports, New York Supreme Court Reports, Vols. 1–7.
Law. Rep. Ann. .	Lawyers' Reports Annotated.
Law Times Rep. .	Law Times Reports, Cases in all the English Courts.
Ld. Raym.	Lord Raymond's Reports, English King's Bench.
Lea	Lea's Reports, Tennessee.
Lead. Cas. Eq. . .	Leading Cases in Equity, White and Tudor.
Leake Cont. . . .	Leake on Contracts.
Lee	Lee's Reports, English King's Bench.
Leg. Chron. . . .	Legal Chronicle, Pottsville, Pa.

Leg. Gaz.	Legal Gazette, Philadelphia.
Leg. Int.	Legal Intelligencer, Philadelphia.
Leigh	Leigh's Reports, Virginia.
Lev.	Levinz's Reports, English King's Bench.
Lew. Tr.	Lewin on Trusts.
Lind. Part.	Lindley on Partnership.
Litt.	Littell's Reports, Kentucky.
Low.	Lowell's Decisions, United States District Court for Massachusetts.
Luz. Leg. Reg.	Luzerne Legal Register, Wilkes-Barre, Pa.
M. W. Prop. Act, 1882	Married Women's Property Act, 1882, England.
M. & C.	Mylne and Craig's Reports, English Chancery.
M. & G.	Manning and Granger's Reports, English Common Pleas.
M. & K.	Mylne and Keen's Reports, English Chancery.
M. & R.	Manning and Ryland's Reports, English King's Bench.
M. & S.	Maule and Selwyn's Reports, English King's Bench.
M. & W.	Meeson and Welsby's Reports, English Exchequer.
MacArthur & M.	MacArthur and Mackey's Reports, District of Columbia.
Mackey	Mackey's Reports, District of Columbia.
Macph. Inf.	Macpherson on Infancy.
MacSwin. M.	MacSwinney on Mines.
Madd.	Maddock's Reports, English Chancery.
Maine Anc. L.	Maine on Ancient Law.
Man. & R.	Manning and Ryland's Reports, English King's Bench.
Marsh., A. K., or *(Ky.)*	Marshall's, A. K., Reports, Kentucky.
Marsh., J. J.	Marshall's, J. J., Reports, Kentucky.
Mart.	Martin's Reports, Louisiana.
Mart. N. S.	Martin's Reports, New Series, Louisiana.
Marv.	Marvel's Reports, Delaware.
Mas.	Mason's Reports, United States Circuit Court, First Circuit.
Mass.	Massachusetts Reports.
Mau. & Sel.	Maule and Selwyn's Reports, English King's Bench.
May Ins.	May on Insurance.
McCord, or *McCord L.*	McCord's Law Reports, South Carolina.

McCrary	McCrary's Reports, United States Circuit Court.
McKinn. Jus. . .	McKinney's Justice.
McLean	McLean's Reports, United States Circuit Court, Seventh Circuit.
Md.	Maryland Reports.
Md. Ch.	Maryland Chancery Reports.
Me.	Maine Reports.
Mechem Ag. . . .	Mechem on Agency.
Mer.	Merivale's Reports, English Chancery.
Metc. (*Ky.*) . . .	Metcalfe's Reports, Kentucky Court of Appeals.
Metc. (*Mass.*) . .	Metcalf's Reports, Massachusetts Reports, Vols. 42–54.
Mich.	Michigan Reports.
Min. Inst.	Minor's Institutes of Common and Statute Law.
Minn.	Minnesota Reports.
Miss.	Mississippi Reports.
Misc. (*N. Y.*), or *Misc. R.*	Miscellaneous Reports, New York Courts.
Mitchell Real Est. and Conv. . . .	Mitchell on Real Estate and Conveyancing.
Mo.	Missouri Reports.
Mo. App.	Missouri Appeal Reports.
Mod.	Modern Reports, English Courts.
Mon., B., or *Monr., B.*	B. Monroe's Reports, Kentucky.
Mon., T. B., or *Monr., T. B.* .	T. B. Monroe's Reports, Kentucky.
Mont.	Montana Reports.
Montr. Q. B. . . .	Montreal's Reports, Queen's Bench.
Montr. Supp. . .	Montriou's Supplement to Morton's Reports, Bengal, India.
Moo. P. C. Cas. .	Moore's Privy Council Cases, English.
Moo. P. C. Cas. N. S.	Moore's Privy Council Cases, New Series, English.
Moo. & M. . . .	Moody and Mackin's Reports, English Nisi Prius.
Moore	J. B. Moore's Reports, English Common Pleas.
Moraw. Priv. Corp., or *Morawetz Corp.*	Morawetz on Private Corporations.
Morse B. & B. .	Morse on Banks and Banking.
Munf.	Munford's Reports, Virginia.
Murf. Jus. Prac. .	Murfree's Justice Practice.
Myl. & C.	Mylne and Craig's Reports, English Chancery.
Myl. & K.	Mylne and Keen's Reports, English Chancery.

N.C.	North Carolina Reports.
N. Dak.	North Dakota Reports.
N. E., *N. E. R.*, or *N. E. Rep.* .	Northeastern Reporter.
N. H.	New Hampshire Reports.
N. J. Law	New Jersey Law Reports.
N. J. Eq.	New Jersey Equity Reports.
N. J. R. S. . . .	New Jersey Revised Statutes.
N. S. L. R. . . .	Nova Scotia Law Reports.
N. W., *N. W. R.*, or *N. W. Rep.* .	Northwestern Reporter.
N. Y.	New York Reports, Court of Appeals.
N. Y. App., or *N. Y. App. Div.* . . .	New York Reports, Appellate Division, Supreme Court.
N. Y. N. I. L. . .	New York Negotiable Instruments Law.
N. Y. R. S. . . .	New York Revised Statutes.
N. Y. St. Rep. . .	New York State Reporter.
N. Y. Sup. Ct., *N. Y. Sup. Ct. Rep.*, *N. Y. Super.*, or *N. Y. Super. Ct.*	New York Superior Court Reports.
N. Y. Supp. . . .	New York Supplement Reports.
Neb.	Nebraska Reports.
Nels. Div.	Nelson on Divorce.
Nev.	Nevada Reports.
New Br.	New Brunswick Reports.
Newb. Adm. . . .	Newberry's Admiralty Reports, United States District Court.
Nib. Ben. Soc. . .	Niblack on Beneficial Societies.
North. Co. Rep. .	Northampton County Reports.
Not. Man.	Rex's Notaries' Manual.
Ohio	Ohio Reports.
Ohio C. C.	Ohio Circuit Court Reports.
Ohio L. J.	Ohio Law Journal.
Ohio St.	Ohio State Reports.
Ont., or *Ont. Rep.*	Ontario Reports.
Ont. App. Rep. .	Ontario Appeal Reports.
Ore.	Oregon Reports.
Otto	Otto's Reports, United States Supreme Court Reports, Vols. 91–102.
(*1893*) *P.*	Law Reports, Probate Division, 1893, English.
(*1895*) *P.*	Law Reports, Probate Division, 1895, English.
(*1896*) *P.*	Law Reports, Probate Division, 1896, English.

P. D.	Law Reports, Probate Division, English.
P. L. Pa.	Pamphlet Laws of Pennsylvania.
P. Wms.	Peere Williams's Reports, English Chancery.
P. & L. Dig. of Dec. & Encycl. of Pa. L.	Pepper & Lewis's Digest of Decisions and Encyclopedia of Pennsylvania Law.
P. & W.	Penrose and Watts's Reports, Pennsylvania.
Pa.	Pennsylvania Reports, Supreme Court.
Pa. Co. Ct.	Pennsylvania County Court Reports.
Pa. Dist., Pa. Dist. R., or *Pa. Dist. Rep.*	Pennsylvania District Court Reports.
Pa. L. J.	Pennsylvania Law Journal, Philadelphia.
Pa. Leg. Gaz. Rep.	Pennsylvania Legal Gazette Reports (Campbell's).
Pa. N. I. L.	Pennsylvania Negotiable Instruments Law.
Pa. P. L.	Pennsylvania Pamphlet Laws.
Pa. Sup., Pa. Sup. Ct., Pa. Super. Ct., or *Pa. Supr. Ct.*	Pennsylvania Superior Court Reports.
Pac. Rep.	Pacific Reporter.
Paige, or *Paige Ch.*	Paige's Reports, New York Chancery.
Paine	Paine's Reports, United States Circuit Court, Second Circuit.
Pal. Ag.	Paley on Agency.
Park. Cr. Rep.	Parker's Criminal Reports, New York.
Pars. Bills & N.	Parsons on Notes and Bills.
Pars. Cas.	Parsons's Select Equity Cases, Pennsylvania.
Pars. Cont.	Parsons on Contracts.
Pars. Mar. Ins.	Parsons on Marine Insurance and General Average.
Pars. Notes & B.	Parsons on Notes and Bills.
Pat. Off. Gaz.	Patent Office Gazette, United States.
Pear.	Pearson's Reports, Pennsylvania.
Penny.	Pennypacker's Reports, Pennsylvania.
Per. T. & T.	Perry on Trusts and Trustees.
Pet.	Peters's Reports, United States Supreme Court.
Pet. Adm.	Peters's Admiralty Decisions, United States District Court for Pennsylvania.
Phila.	Philadelphia Reports, Pennsylvania.
*Phill.,*or *Phill. Ecc.*	Phillimore's Reports, English Ecclesiastical Courts.
Phill. Ch.	Phillips's Chancery Reports, English.
Phill. Ins.	Phillips's Law of Insurance.
Phill. Mech. Liens	Phillips on Mechanics' Liens.

Pick.	Pickering's Reports, Massachusetts Reports, Vols. 18–41.
Ping. Mort. . . .	Pingree on Mortgages.
Pitts.	Pittsburg Reports, reprinted from the Pittsburg Law Journal.
Pitts. L. J. N. S.	Pittsburg Law Journal Reports, New Series.
Plowd.	Plowden's Commentaries or Reports, English King's Bench.
Poll. Cont.	Pollock on Contracts.
Poll. & Maitl. . .	Pollock and Maitland's History of English Law.
Pom. Civ. Rem. .	Pomeroy on Civil Remedies.
Pom. Code Rem. .	Pomeroy on Code Remedies.
Pom. Eq. Jur., or *Pom. Eq. Juris.*	Pomeroy on Equity Jurisprudence.
Port.	Porter's Reports, Alabama.
Port. B. of L. . .	Porter on Bills of Lading.
Porter Corp. . . .	Porter on Corporations.
Porter Ins.	Porter on Insurance.
Poth. Obl.	Pothier on Obligations.
Potter's Dwar. St.	Potter's Dwarris on Statutes.
Pow. Cont.	Powell on Contracts.
Pres. Est.	Preston on Estates.
Pres. Shep. T. . .	Preston's Sheppard's Touchstone.
Price	Price's Reports, English Exchequer.
Proff. Not.	Proffat on Notaries.
Puff. Law of Nations	Puffendorf's Law of Nature and Nations.
Purd. Dig.	Purdon's Digest of Pennsylvania Laws.
Q. B.	Queen's Bench Reports, English (Adolphus and Ellis's Reports, New Series).
(*1891*) *Q. B.* . . .	Law Reports, Queen's Bench Division, 1891, English Supreme Court of Judicature.
(*1893*) *Q. B.* . . .	Law Reports, Queen's Bench Division, 1893, English Supreme Court of Judicature.
(*1896*) *Q. B.* . . .	Law Reports, Queen's Bench Division, 1896, English Supreme Court of Judicature.
(*1898*) *Q. B.* . . .	Law Reports, Queen's Bench Division, 1898, English Supreme Court of Judicature.
Q. B. Div.	Law Reports, Queen's Bench Division, English Supreme Court of Judicature.
R. I.	Rhode Island Reports.
R. S.	Revised Statutes, particularly the Revised Statutes of the United States.
R. & M.	Russell and Mylne's Reports, English Chancery.

Railw. Corp. Law J.	Railway and Corporation Law Journal.
Rand.	Randolph's Reports, Virginia.
Rand. Com. Paper	Randolph on Commercial Paper.
Rapal. & Lawr. Dict.	Rapalje and Lawrence's Law Dictionary.
Rawle	Rawle's Reports, Pennsylvania.
Rawle Cov.	Rawle on Covenants for Title.
Raym., Ld.	Lord Raymond's Reports, English King's Bench.
Redf.	Redfield's Reports, New York Surrogate Courts.
Reed Fraud	Reed's Leading Cases on the Statute of Frauds.
Reeve Dom. Rel.	Reeve on Domestic Relations.
Rep. Roy. Copyr. Com., 1878	Report of the Royal Copyright Commission, 1878, England.
Rev. Stat.	Revised Statutes of the United States.
Rich. Eq.	Richardson's Equity Reports, South Carolina
Rich. L.	Richardson's Law Reports, South Carolina.
Rob. (La.)	Robinson's Reports, Louisiana.
Rob. (N. Y.)	Robertson's Reports, New York Superior Court Reports.
Rob. Ecc.	Robertson's Ecclesiastical Reports, English.
Rob. Pat.	Robinson on Patents.
Robt.	Robertson's Reports, New York Superior Court Reports.
Rolle Abr.	Rolle's Abridgment.
Root	Root's Reports, Connecticut.
Rose	Rose's Reports, English Bankruptcy.
Russ.	Russell's Reports, English Chancery.
Ry. & M.	Ryan and Moody's Reports, English Nisi Prius.
S. C.	South Carolina Reports, Court of Appeals and Court of Errors.
S. Dak.	South Dakota Reports.
S. E., or *S. E. Rep.*	Southeastern Reporter.
S. W., *S. W. R.*, or *S. W. Rep.*	Southwestern Reporter.
S. & M.	Smedes and Marshall's Reports, Mississippi Reports, Vols. 9–22.
S. & R.	Sergeant and Rawle's Reports, Pennsylvania.
S. & T.	Swabey and Tristam's Reports, English Probate and Divorce Cases.
Salk.	Salkeld's Reports, English King's Bench.
Sandf.	Sandford's Reports, New York City Superior Court Reports.
Sandf. Ch.	Sandford's Chancery Reports, New York.
Saund.	Saunder's Reports, English King's Bench.

Saund. Mag. Pr.	Saunder's Magistrates' Courts Practice.
Savigny, Dr. Rom.	Savigny's Droit Romaine.
Saw., or *Sawy.* . .	Sawyer's Reports, United States Circuit Court, Ninth Circuit.
Sc. L. R	Scottish Law Reporter, Edinburgh.
Sc. Sess. Cas. . .	Scotch Court of Session Cases.
Sch. & Lef. . . .	Schoales and Lefroy's Reports, Irish Chancery.
Schoul. Bailm. . .	Schouler on Bailments.
Schoul. Dom. Rel.	Schouler on Domestic Relations.
Schoul. Per. Pr. .	Schouler on Personal Property.
Sedgw.	Sedgwick on Statutory and Constitutional Law.
Sedgw. Meas. D. .	Sedgwick on the Measure of Damages.
Sh. & Dunl. . . .	Shaw and Dunlop's Reports, Scotch Court of Session.
Shannon	Shannon's Reports, Tennessee.
Sharsw. Black. Comm.	Sharswood's Blackstone's Commentaries.
Shelf. J.-S. Co. . .	Shelford on Joint-Stock Companies.
Shelf. M. & D. .	Shelford on Marriage and Divorce.
Shep. Touch. . . .	Sheppard's Touchstone.
Show.	Shower's Reports, English King's Bench.
Sid.	Siderfin's Reports, English King's Bench.
Sim.	Simon's Reports, English Chancery.
Sim. & St. . . .	Simon and Stuart's Reports, English Chancery.
Sm., E. D. . . .	E. D. Smith's Reports, New York Common Pleas.
Sm. Ex. Int. . . .	Smith on Executory Interests.
Sm. L.	Smith's Laws, Pennsylvania.
Sm. L. C., or *Sm. Lead. Cas.* . . .	Smith's Leading Cases.
Sm. L. & T. . .	Smith on Landlord and Tenant.
Sm. Mast. & Servt.	Smith on Master and Servant.
Sm. Merc. Law .	Smith on Mercantile Law.
Sm. & M.	Smedes and Marshall's Reports, Mississippi Reports, Vols. 9–22.
Sm. & M. Ch. . .	Smedes and Marshall's Chancery Reports, Mississippi.
Smith (Eng.) . . .	Smith's Reports, English King's Bench.
Smith, E. D. . . .	E. D. Smith's Reports, New York Common Pleas.
Sneed	Sneed's Reports, Tennessee.
Snell Eq.	Snell's Principles of Equity.
So. Rep.	Southern Reporter.
Spear	Spear's Reports, South Carolina.
Spen. Man. Com. Law	Spencer's Manual of Commercial Law.

Spinks	Spinks's Reports, English Ecclesiastical and Admiralty Cases.
St. Can.	Statutes of Canada.
Stand. Dict. . . .	Standard Dictionary.
Stark., or *Stark. N. P.*	Starkie's Reports, English Nisi Prius.
Stat. at L., or *Stat. L.*	Statutes at Large of the United States.
Stew.	Stewart's Reports, New Jersey Equity Reports, Vols. 28–33.
Stim. Am. Stat. Law	Stimson's American Statute Law.
Sto. Eq. Juris. . .	Story on Equity Jurisprudence.
Story	Story's Reports, United States Circuit Court, First Circuit.
Story Ag.	Story on Agency.
Story Bailm. . . .	Story on Bailments.
Story Bills Ex. .	Story on Bills of Exchange.
Story Confl. . . .	Story on Conflict of Laws.
Story Cont. . . .	Story on Contracts.
Story Eq., or *Story Eq. Jur.*	Story on Equity Jurisprudence.
Story Prom. N. .	Story on Promissory Notes.
Stra.	Strange's Reports, English Courts.
Strob., or *Strobh.* .	Strobhart's Law Reports, South Carolina.
Strob. Eq.	Strobhart's Equity Reports, South Carolina.
Sumn.	Sumner's Reports, United States Circuit Court, First Circuit.
Sup. Ct. (*Pa.*), or *Sup. Ct. Rep.* (*Pa.*)	Superior Court Reports, Pennsylvania.
Sw. & Tr.	Swabey and Tristam's Reports, English Probate and Divorce Cases.
Swan	Swan's Reports, Tennessee.
Sweeny	Sweeny's Reports, New York Superior Court Reports, Vols. 31–32.
Swift Dig.	Swift's Connecticut Digest.
T. B. Mon., or *T. B. Monr.* . . .	T. B. Monroe's Reports, Kentucky.
T. R.	Term Reports, English King's Bench (Durnford and East's Reports).
T. U. P. Charlt. .	T. U. P. Charlton's Reports, Georgia.
Taunt.	Taunton's Reports, English Common Pleas.
Tayl. Corp.	Taylor on Corporations.
Tayl. L. & T. . .	Taylor on Landlord and Tenant.

Tenn.	Tennessee Reports.
Tenn. Ch.	Tennessee Chancery Reports.
Term	Term Reports, English King's Bench.
Tex.	Texas Reports.
Tex. App.	Texas Appeal Reports, Criminal Cases.
Tex. App. Civ. Cas., *Tex. Civ. App.*, or *Tex. Civ. App. Cas.*	Texas Civil Appeal Reports.
Tex. Crim. Rep.	Texas Criminal Reports.
Tex. Ct. of App.	Texas Court of Appeal Reports.
Thomp. Car.	Thompson on Carriers.
Thomp. Corp.	Thompson on Corporations.
Thomp. Liab. Stockh.	Thompson on the Liability of Stockholders.
Thomp. & C.	Thompson and Cook's Reports, New York Supreme Court.
Tiff. Dom. Rel.	Tiffany on Domestic Relations.
Times L. R.	Times Law Reports, English Courts.
Toull.	Toullier's Droit Civil Français.
Turn. & Rus.	Turner and Russell's Reports, English Chancery.
Tyler Inf.	Tyler on Infancy.
U. C. C. P.	Upper Canada, Common Pleas Reports.
U. C. Ch.	Upper Canada, Chancery Reports.
U. C. Q. B.	Upper Canada, Queen's Bench Reports.
U. S.	United States Supreme Court Reports.
U. S. App.	United States Circuit Court of Appeals Reports.
U. S. B. L.	United States Bankruptcy Law.
U. S. R. S.	United States Revised Statutes.
U. S. Stat. at L.	United States Statutes at Large.
Va.	Virginia Reports.
Vaugh.	Vaughn's Reports, English Common Pleas.
Vern.	Vernon's Reports, English Chancery.
Ves.	Vesey's Reports, English Chancery.
Ves. Jr.	Vesey Junior's Reports, English Chancery. (Vesey Senior's Reports include two volumes only, of cases decided from 1746 to 1755. Vesey Junior's Reports include fourteen volumes, of cases decided from 1789 to 1808.)
Ves. & B., or *Ves. & Beam.*	Vesey and Beames's Reports, English Chancery.
Vin. Abr.	Viner's Abridgment.
Vr., or *Vroom*	Vroom's Reports, New Jersey Law Reports, Vols. 30–41.
Vt.	Vermont Reports.

W. Bla.	William Blackstone's Reports, English Common Pleas and King's Bench.
W. N. C., or *W. N. Cas.*	Weekly Notes of Cases, Philadelphia.
W. R.	Weekly Reporter, London.
W. Va.	West Virginia Reports.
W. & S.	Watts and Sergeant's Reports, Pennsylvania.
Wall.	Wallace's Reports, United States Supreme Court.
Ware	Ware's Reports, United States District Court for Maine.
Wash.	Washington Reports.
Wash. (*U. S.*), or *Wash. C. C.* . .	Washington's Reports, United States Circuit Court, Third Circuit.
Wash. Ty., or *Wash. Ter.*	Washington Territory Reports.
Washb. Easem. . .	Washburn on Easements and Servitudes.
Washb. R. P. . . .	Washburn on Real Property.
Watts	Watts's Reports, Pennsylvania.
Web. Pat. Cas. . .	Webster's Patent Cases.
Weekly Cin. L. Bull.	Weekly Cincinnati Law Bulletin, Cincinnati, Ohio.
Wend.	Wendell's Reports, New York Supreme Court.
Whart.	Wharton's Reports, Pennsylvania.
Whart. Ag. . . .	Wharton on Agency.
Whart. Confl. L. .	Wharton on Conflict of Laws.
Whart. Cont. . . .	Wharton on Contracts.
Whart. Dict. . . .	Wharton's Law Dictionary.
Wheat.	Wheaton's Reports, United States Supreme Court.
Wheel. Cr. Cas. .	Wheeler's Criminal Cases, New York.
White Corp. . . .	White on Corporations.
White & T. L. Cas.	White and Tudor's Leading Cases, Equity.
Wis.	Wisconsin Reports.
Wms. Ex.	Williams on Executors.
Wms. Real Pr. . .	Williams on Real Property.
Wood., or *Woods* .	Woods's Reports, United States Circuit Court, Fifth Circuit.
Wood Fire Ins. . .	Wood on Fire Insurance.
Wood Mast. & Servt.	Wood on Master and Servant.
Woodf. L. & T. .	Woodfall on Landlord and Tenant.
Woodw.	Woodward's Decisions, Pennsylvania District Court.
Woolw.	Woolworth's Reports, United States Circuit Court, Eighth Circuit.
Wright	Wright's Reports, Pennsylvania Reports, Vols. 37–50.

Y. & C. Ch.	Young and Collyer's Reports, English Chancery.
Y. & C. Ex.	Young and Collyer's Reports, English Exchequer.
Yeates	Yeates's Reports, Pennsylvania.
Yerg.	Yerger's Reports, Tennessee.
Zane B. & B.	Zane on Banks and Banking.

ADDENDA

Barn. & Cr.	Barnewall and Cresswell's Reports, English.
Binney	Binney's Reports, Pennsylvania.
Black. Com.	Blackstone's Commentaries.
Bouv. Dict.	Bouvier's Law Dictionary.
Breese	Breese's Reports, Illinois.
Chal. Dig. B. of E. Act	Chalmers Digest of the English Bills of Exchange Act.
Code of Tennessee	Code of Statute Laws of Tennessee.
Cranch, C. C.	Cranch's Reports, United States Circuit Court, District of Columbia.
Daniel Neg. Ins.	Daniel on Negotiable Instruments.
Grant Bank.	Grant's Law of Banking (Eng.).
Hurlst. and C.	Hurlstone and Coltman's Reports, English Exchequer.
Ibid.	A contraction of *ibidem*, meaning at the place in the book already mentioned.
Infra.	Below, or beneath.
Jur.	The Jurist, London, Reports in all the English Courts.
McGloin	McGloin's Reports, Louisiana Court of Appeals.
Mont. & McA.	Montagu and McArthur's Reports, English Bankruptcy.
Phila. Rep.	Philadelphia Reports, Pennsylvania.
Pigott on Torts	Pigott on Torts.
Q. B. D.	Queen's Bench Division, English Law Reports.
Rich.	Richardson's Law Reports, South Carolina.
Stark. Ev.	Starkie on Evidence.
Supra.	Above, before.
Vict.	Queen Victoria.
Wharton, Neg.	Wharton on Negligence.

THE LAW IN GENERAL

INTRODUCTION

1. The most perfect and satisfactory description of law that lives in instructive pages is this conception of Demosthenes: "The design and object of the laws is to ascertain what is just, honorable, and expedient; and, when that is discovered, it is proclaimed as a general ordinance, equal and impartial to all. This is the origin of law, which, for various reasons, all are under an obligation to obey; but especially because all law is the invention and gift of Heaven, the sentiment of wise men, the correction of every offense, and the general compact of the state; to live in conformity with which is the duty of every individual in society."[1]

The explanation of the several properties of municipal law, as they arise out of the definition given below, is so well expressed by Sir William Blackstone in his commentaries, that to modify or change it materially would be profanation. Zealous preceptors of the law reverently caution students that the great commentator's clear definitions and forceful statements should be ardently adopted. Attempts to change the style of a text, which has been pronounced "the most correct and beautiful outline that ever was exhibited of any human science," invariably result in mutilation of the noble achievement of an artist of whom it has been attested: "He it was who first gave to the law the air of a science. He found it a skeleton, and clothed it with life, colour, and complexion: he embraced the cold statue, and by his touch it grew into youth, health, and beauty."

[1] Orat. 1, Cont. Aristogit.

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DEFINITIONS

2. **Law,** in its most general and comprehensive sense, signifies that rule of action which is prescribed by some superior, and which the inferior is bound to obey.[2] **Municipal law** is a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.[3]

3. And, first, it is a *rule*, not a transient sudden order from a superior to or concerning a particular person, but something permanent, uniform, and universal; and the term is used to distinguish it from advice or counsel, which a person is at liberty to follow or not, as he sees proper, and to judge upon the reasonableness or unreasonableness of the thing advised; whereas, obedience to the law depends not upon the person's approbation, but upon the maker's will. Counsel is only matter of persuasion, law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also. It is also called a rule to distinguish it from a compact or agreement; for an agreement is a promise proceeding from the person, law is a command directed to the person.[4]

4. As a rule of *civil conduct*, municipal law is distinguished from the natural, or revealed, law, the former of which is the rule of moral conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbor, considered in the light of an individual. But municipal, or civil, law regards him also as a citizen, and bound to other duties towards his neighbor than those of mere nature and religion; duties which he has engaged in by enjoying the benefits of the common union, and which amount to no more than that he contributes, on his part, to the subsistence and peace of the society.[5]

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[2] 1 Black. Comm. 38. [3] *Ibid.* 44. [4] *Ibid.* 44. [5] *Ibid.* 45.

It is likewise "a rule *prescribed*." A bare resolution, confined in the breast of the legislator without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be made known to the people who are to obey it. The manner in which the notification is to be made is a matter of indifference. The notification may be verbally by officers appointed for that purpose, as, formerly, in the case of proclamations; or, it may be by writing, printing, or the like, which is the method usually employed.[6]

5. The rule must be prescribed *by the supreme power in a state*. Legislature is the greatest act of superiority that can be exercised by one being over another. Wherefore, it is requisite to the very essence of a law that it be made by the supreme power—that it be prescribed by the law-making power in the state.[7] As the power of making laws constitutes the supreme authority, so, wherever the supreme authority in any state resides, it is the right of that authority to make laws, that is, to prescribe the rule of civil action. This may be discovered from the very end and institution of civil states. A state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man, by uniform will. But, inasmuch as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any *natural union* be joined together, or tempered and disposed into a lasting harmony so as to constitute and produce that one uniform will of the whole. It can therefore be produced in no other manner than by a *political union;* by the consent of all persons to submit their own private wills to the will of one man, or of one or more assemblies of men, to whom the supreme authority is intrusted; and this will of that one man, or assemblage of men, is, in different states, according to their different constitutions, understood to be law.[8]

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[6] 1 Black. Comm. 45. [7] *Ibid.* 46; 1 Kent's Comm. 447. [8] 1 Black. Comm. 52.

6. It is likewise the *duty* of the supreme power to make laws. For since the respective members are bound to conform themselves to the will of the state, it is expedient that they receive directions from the state declaratory of its will. It is incumbent on the state to establish rules for the perpetual information and direction of all persons in all points, whether of positive or negative duty. And this, in order that every man may know what to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest, or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of those rights which the state assigns him, in order to promote and secure the public tranquility.[9]

CONSTITUENT PARTS OF A LAW

7. Every law may be said to consist of several parts: one, **declaratory,** whereby the rights to be observed, and the wrongs to be eschewed are clearly defined and laid down; another, **directory,** whereby the people are instructed and enjoined to observe those rights and to abstain from the commission of those wrongs; a third, **remedial,** whereby method is pointed out to recover private rights or redress private wrongs; a fourth, **vindicatory,** whereby is signified what evil or penalty shall be incurred by such as commit any public wrongs and transgress or neglect their duty. This branch of the law is usually termed the **sanction.**[10]

The *declaratory* part of the municipal law depends not so much upon the law of revelation or of nature, as upon the wisdom and will of the legislator. Natural rights, such as life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human

[9] 1 Black. Comm. 52, 53.

[10] *Ibid.* 54.

legislature has power to abridge or destroy them, unless some act be committed that amounts to a forfeiture. Neither do divine or natural duties, such as the worship of God, the maintenance of children, and the like, receive any stronger sanction from being so declared to be duties by the law of the land. The case is the same as to crimes and misdemeanors that are forbidden by the supreme laws, and, therefore, called wrong in themselves, such as murder, theft, and perjury, which contract no additional turpitude from being declared unlawful by the inferior legislature. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all with regard to actions that are naturally and intrinsically right or wrong. But, with regard to things in themselves indifferent, the case is altered. These become either right or wrong, just or unjust, duties or misdemeanors, according as the state sees proper, for promoting the welfare of society, and more effectually carrying on the purposes of civil life.

The *directory* part of the law stands much upon the same footing as the declaratory, and virtually includes the latter, the declaration being usually collected from the direction.[11]

The *remedial* part of the law is so necessary a consequence of the former two, that laws would be very vague and imperfect without it. For in vain would rights be declared and directed to be observed, if there were no method of recovering and asserting those rights when wrongfully withheld or evaded. This is what is meant by the *protection* of the law.

Human legislators have for the most part usually chosen to make the *sanction* of laws *vindicatory* rather than remuneratory, that is, to consist rather in punishments than in particular rewards; because, the quiet enjoyment and protection of all civil rights and liberties, which are the sure and general consequence of obedience to the municipal law, are in themselves the best and most valuable of all rewards; because, also, if the observance of the laws were to be enforced by the proposal of particular rewards, it would be impossible for any state to furnish stock enough for so profuse a bounty; and,

[11] 1 Black. Comm. 54, 55.

because the dread of evil is a much more forcible principle of human actions than the prospect of good. Of all parts of a law the most effectual is the vindicatory, for its main force and strength consist in the penalty annexed to it. Legislators and their laws are said to *compel* and *oblige;* not that by any natural violence they so constrain a man as to render it impossible for him to act otherwise than as they direct, which is the strict sense of obligation, but because, by declaring and exhibiting a penalty against offenders, they bring it to pass that no one can easily choose to transgress the law, since, by reason of the impending correction, compliance is in a high degree preferable to disobedience. And, even where rewards are proposed as well as punishment threatened, the obligation of the law seems chiefly to consist in the penalty; for rewards, in their nature, can only persuade and allure; nothing is *compulsory* but punishment.[12]

COMMON LAW AND WRITTEN LAW

COMMON LAW

8. Common law, in its broadest and most general signification, means those rules or precepts of law in any country, or that body of its jurisprudence, which is of equal application in all places, as distinguished from local laws and rules.[13] It is that system of law, or form of the science of jurisprudence, which has prevailed in England and the United States, in contradistinction to other great systems, such as the Roman, or civil, law.[14]

The phrase *common law* is usually applied to the common law of England exclusively, or that part of the law which

[12] 1 Black. Comm. 56, 57.

[13] Abbott's Law Dict. 253.

[14] Bouv. Law Dict. The Roman, or civil, law, in its most extensive sense, comprises all those legal rules and principles which were in force among the Romans, without reference to the time when they were adopted. In a more restrictive sense, it is the law compiled under the auspices of the Emperor Justinian, and which is still in force in many of the states of modern Europe, and in the state of Louisiana, United States. The term *civil law* is commonly used by and in a few of the United States, notably Louisiana. It is also commonly used by English and American authors to signify the whole system of Roman law.

was administered in that country before the Judicature Acts by the common-law tribunals, as opposed to equity, or that part of the law which was administered by the court of chancery.[15] It was denominated the *unwritten law* by Blackstone, and includes general customs, particular customs prevailing only in certain districts, and those particular laws that are by custom observed only in certain courts and jurisdictions.[16]

9. The common law of the United States is composed of the common law of England and the usages that have grown up in, and are indigenous to, the United States. When the ancestors of the people of the states emigrated from England, they brought with them such principles as were expedient for the situation, together with such English statutes as were amendatory of the common law as it then existed.[17] Practically, the common law, as recognized in the United States, consists of the local usages and customs of the sovereign and independent states, which together constitute the federal government. There is no principle which pervades the whole union of states, and which has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of the federal system only by legislative adoption.[18] In the sense that the common law exists in the United States, it includes only general customs and particular laws, and not particular customs.[19]

The common law is part of the jurisprudence of the District of Columbia. When congress created the District of Columbia, the common law prevailed in Maryland and Virginia, from which states the District was formed, and the existing laws of those states were declared to be still in force.[20] The common law is the basis of the laws of those states which were originally colonies of England, or carved

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15 3 Pet. (U. S.) 446 (1830); Sweet's Law Dict. 173.
16 1 Black. Comm. 63.
17 5 Binn. (Pa.) 554 (1813); Am. & Eng. Encyc. (2d Ed.), Vol. 6, p. 271; 2 Mass. 530 (1807).
18 8 Pet. (U. S.) 658 (1834).
19 62 Fed. Rep. 24 (1894).
20 1 Cranch (U. S.) 252 (1803).

out of such colonies; but no such presumption can apply to states in which a government already existed at the time of their accession to the country—Louisiana, Texas, and Indian Territory.[21]

10. The statutes, amending or altering the common law, which were brought over from England by the early settlers, were never reenacted in this country, but were considered as incorporated into the common law. Some few other English statutes, passed after the emigration, were adopted by the different state courts, and now have the authority of law derived from long practice.[22] In some states, by express legislative enactment, all the acts of parliament passed before the fourth year of the reign of James I are made part of the law of those states.[23]

CUSTOMS AND USAGES

11. Customs.—A **custom** is a usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates.[24] If it be universal, it is common law; if particular, it is then properly custom. By its universality and antiquity, a custom acquires the force and effect of law in a particular place or country, in respect to the subject-matter to which it relates, and is ordinarily taken notice of without proof.[25] It must be uniform and universal within the sphere of its action and have existed from time immemorial.[26] Customs are of two kinds, *general* and *particular*.

12. General customs are such as prevail throughout a country and become the law of that country. They comprehend those principles and maxims, usages, and rules of action of which observation and experience of the nature of man, the constitution of society, and the affairs of life have

[21] 15 Cal. 252 (1860).
[22] 2 Mass. 530 (1807).
[23] 11 Colo. 393 (1888); 4 Ill. 301 (1841).
[24] Black's Law Dict. 312.
[25] 110 Ind. 334 (1886).
[26] 40 Pa. 243 (1861).

commended to enlightened reason as best calculated for the government and security of persons.[27] The authority of a general custom rests entirely upon general reception and usage; and the only method of proving that this or that maxim or custom is a rule of the common law is by showing that it has always been the custom to observe it.[28]

These customs and maxims are to be known, and their validity to be determined, by the judges in the various courts of justice. Their knowledge of the law is derived from experience and study, and from being long accustomed to the decisions of their predecessors. These judicial decisions are the principal and most authoritative evidences that can be given of the existence of such a custom as shall form a part of the common law.[29]

13. Particular customs are such as prevail in some particular places, and are of no practical importance in the United States. They are the remains of that multitude of local English customs out of which the common law was at first collected; and, as Blackstone states it, "each district mutually sacrificing some of its own special usages, in order that the whole kingdom might enjoy the benefit of one uniform system of laws. But, for reasons that have been now long forgotten, particular counties, cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large: which privilege is confirmed to them by several acts of parliament.[30] Such is the custom of gavelkind in Kent (England), and some other parts of the kingdom, that not the eldest son only of the father, but all the sons alike shall succeed to their father's estate; and that of borough-English, that the youngest son shall inherit the estate, in preference to all his elder brothers."[31]

To this class belongs the law merchant.[32] Those customs that have been universally and notoriously prevalent among

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27 23 Me. 94 (1843); 2 Park. Cr. Rep., (N. Y.) 176 (1855).
28 1 Black. Comm. 68.
29 *Ibid.* 69.
30 *Ibid.* 74.
31 *Ibid.* 74, 75.
32 6 M. & G. (Eng.) 665 (1843).

merchants, and have been found by experience to be of public use, have been adopted as part of the common law, upon a principle of convenience and for the benefit of trade and commerce.[33] In the United States, the law merchant, so far as it is applicable and not at variance with the constitution and laws of the respective states, is part of the common law of that country.[34]

14. Usages.—**Usage** is a reasonable and lawful public practice concerning transactions of the same nature as those that are to be effected thereby, existing at the place where the obligation is to be performed, and either known to the parties, or so well established, general, and uniform, that they must be presumed to have acted with reference to it.[35] It differs from a custom in that it does not require that it should be immemorial to establish it, but it must be known, certain, uniform, general, reasonable, and not contrary to law.[36] Moreover, a usage is *local* in all cases and *must be proved;* whereas, a custom is frequently general, and as such is noticed without proof.

Usages are not strictly part of the law. They never assume a character so binding that parties cannot by agreement place their contracts without their influence. They are at most but a part and parcel of the contract entered into by the parties, the subject of proof like other facts, and are only binding because they are part of the contract. It is not necessary to prove in each case that the parties in fact incorporated the usage into their contract, but it must be shown by testimony that the particular practice is so general and so known as to raise the inference that the parties knew of its existence and contracted with reference to it.[37]

While a usage may be received to modify a contract, to explain the intention of the parties to it in case of an ambiguity, or the meaning of certain words used, to control to some extent the modes of dealing between parties in like

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[33] See *The Law of Commercial Paper:* General Remarks.
[34] 70 Fed. Rep. 474 (1895).
[35] Civil Code (Dak.) 2,119.
[36] 3 Brewst. (Pa.) 452 (1870).
[37] 28 Ala. 708 (1856).

business, as well as the manner of performing their contracts, it cannot be received to establish a liability or to prove the origin of the relation by which the parties become responsible to each other. Such a usage may have an application to a contract previously existing, but cannot of itself create one; nor can it be introduced to change an express contract, or in violation of an established principle of law.[38]

15. The proof of usage involves a mixed question of law and fact. If the evidence offered by either party be evidence by law admissible for the determination of the question before a jury, the judge is bound to lay it before them, and to call upon them to decide upon the effect of such evidence when offered. Whether the evidence be of that character and description, which makes it admissible, is a question for the determination of the judge alone and is left solely to his decision.[39]

WRITTEN LAW

16. A **written law** is a statute law, as distinguished from the common law. Written laws comprise *constitutions*, and the acts of such legislative bodies as *parliament*, *congress*, and *state legislatures*, and the ordinances of the *councils of municipalities* known as *cities* and *boroughs*.

CONSTITUTIONS

17. A **constitution** is the supreme, organized will of the people acting in convention and assigning to the different departments of the government their respective powers. It is certain and fixed, and is the supreme law of the land. It is paramount to the power of legislature, and can be revoked or altered only by the power that made it.[40] But, while this is true of the constitution of the United States and the various state constitutions, in England, parliament

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[38] 80 Me. 503 (1888); see *The Law of Contracts:* Interpretation of Contracts, Custom and Usage.

[39] 7 M. & G. (Eng.) 743 (1844).

[40] 2 Dall. (U. S.) 304 (1793); 1 Ark. 27 (1837).

is supreme. It can change and create anew even the constitution of the kingdom, and of parliament themselves. Such power has been called the omnipotence of parliament.[41] Constitutions are of two kinds, *cumulative*, or *evolved*, and *conventional*, or *enacted*.

18. **Cumulative, or evolved, constitutions** are those that have not been formed at any specific time nor by any systematic method, but are the result of political evolution.[42] The constitution of England belongs to this class.[43]

19. A **conventional, or enacted, constitution** is one that has been inaugurated by delegated authority at a particular time and has been given definite written form.

20. Written constitutions are of two kinds, **democratic** and **monarchical.**[44] The former emanate directly from the will of the people, while in the latter the popular will **is not** consulted.[45]

The constitution of the United States, in its more essential and fundamental character, is a *tripartite* instrument. The parties to it are the states, the people, and the United States.

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[41] 1 Black. Comm. 161.

[42] Freeman, Growth of the Eng. Const. (1884), p. 122; Jameson, Constitutional Conventions (4th Ed.), Sec. 72; Ordronaux, Constitutional Legislation in the U. S.

[43] England has no written constitution. The Magna Charta, the Bill of Rights, and the Act of Settlement are component parts of its evolved constitution. In forming these measures the people had no agency.—T. U. P. Charlt. Rep. (1 Ga.), 175 (1808). "The King, Lords, and Commons are vested with unlimited power. They can change at any time the established form of government, and have done so in many instances, as in the change of succession to the throne, the powers and organization of the Lords and House of Commons. What is popularly termed the English constitution are certain principles according to which the government has been organized, and which, according to the most liberal view, forms an implied restriction upon the omnipotence of the King, Lords, and Commons. Yet it is certain that, if Parliament were to pass a law clearly inconsistent with those principles, no court in England would venture to pronounce it void. And if it could not be repealed by the force of the popular will, by the same power which made it, it would have to be submitted to as the law of the land, unless the people chóse to resort to a revolution. Revolution means nothing more nor less than a peaceable or forcible change by a people of their constitution."—Sharswood's Notes to Black. Comm. 49.

[44] Of the monarchical class were the charters granted by the royal authority of the British Colonies, which afterwards became the United States.—Am. & Eng. Encyc. (2d Ed.), Vol. 6, 893 (note).

[45] T. U. P. Charlt., 1 Ga. 175 (1808).

The last is a resulting party brought into existence by it, but, when thus created, bound in all respects by its provisions.[46]

"The constitutions of the American republics have always been written. The charters which prescribed the forms of government were so. Those adopted by the several states at the period of the Revolution were *all* so. They not only organized the several departments—the legislative, executive, and judicial—but by various Bills of Rights, as well as express restrictions, prescribed limitations to the power of the government. In other words, certain of the powers of sovereignty they refused to delegate, and, as to others, provided that they should only be exercised in a prescribed manner. It results that the provisions of the constitution, emanating directly from the people, are the expression of their permanent will, and no act of the government inconsistent with it of any validity. The courts will pronounce such acts invalid, null, and void."[47]

By the constitution of the United States, with paramount authority over the people of all the states, certain specified powers were delegated to a general or federal government—all powers not delegated being reserved to the states or to the people. The special powers thus delegated are principally such as concern the foreign relations of the country, the rights of war and peace, the regulation of foreign and domestic commerce, and other objects most appropriately assigned to the general government.[48]

STATUTES

21. A **statute** is the express written will of the legislative department of government, rendered authentic by certain prescribed forms and solemnities;[49] a law established

[46] 3 Wis. 96 (1854).

[47] Sharswood's Notes to 1 Black. Comm. 49. In the United States, all the constitutions, federal and state, have been written, with the exception of that of Connecticut, prior to 1818, and that of Rhode Island, prior to 1842.—Am. & Eng. Encyc. of Law (2d Ed.), Vol. 6, p. 892 (note).

[48] Sharswood's Notes to 1 Black. Comm. 50.

[49] 1 Kent's Comm. 447; 51 Miss. 773 (1875).

by the act of the legislative power. The term *statute* designates the *written law* in contradistinction to the *unwritten law*.[50]

In Great Britain, a statute is an act of parliament; in the United States, it is an act of congress, or of a state or territorial legislature, passed and promulgated according to the constitutional requirements.[51] The terms *statute* and *act* are synonymous. The term *statute* in the civil law applies to any law or usage, though resting for its authority on judicial decisions or the practice of nations.[52]

22. Kinds of Statutes.—In respect to subject-matter, statutes are *public*, or *general*, and *private*, or *special*.

Public statutes are such as relate to, concern, and affect the public generally, the community at large, without distinction in any respect. They operate alike and in the same degree upon all individuals and classes of persons and their interests, subject to the law, where they are in the same condition and circumstances.[53] It is not necessary in order to give a statute the attributes of a public law that it should be equally applicable to all parts of the state; all that is necessary is that it should apply to all persons within the territorial limits described in the act. It is the quality of public, general, and common right or purpose that makes the statute a public one.[54] The terms *general* and *public* are synonymous, as used in this connection. Usually, with reference to the extent of territory controlled, a statute is *general* or *local*.

A *local statute* is one that touches but a portion of the territory of a state, a part of its people, or a fraction of the property of its citizens.[55] In this sense the term *local* is the opposite of *general*. To determine whether a statute is local or general, is to ascertain whether the people of the state may be affected; if they may be, it is general; if not, it is local.[56]

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50 Bouv. Law Dict.
51 Cent. Dict.
52 2 Kent's Comm. 456.
53 93 N. C. 602 (1885.)
54 29 Md. 516 (1868); 49 Vt. 282 (1877).
55 43 N. Y. 16 (1870); 93 N. C. 600 (1885).
56 5 Lans. (N. Y.) 115 (1871).

Private statutes are such as relate to, concern, and affect particular persons, or something in which individuals or classes of persons are interested in a way and degree peculiar to themselves, and not common to the whole community.[57] A private act bears upon individuals only, such as an act changing one's name; settling the title to, or authorizing the sale of, a particular parcel of land; directing the payment of a person's claim against the government.[58]

23. In respect to the compliance required, statutes are *mandatory*, *directory*, *prohibitory*, and *permissive*.

A statute is **mandatory** when non-compliance with its provisions will render the act done under it absolutely void.[59]

By a **directory statute** is meant one that gives directions which ought to be followed, but not so as limiting the power, in respect to which the directions are given, that it cannot be effectually exercised without observing them.[60]

A **prohibitory statute** is one that forbids all actions which disturb the public repose, or injuries to the rights of others, or crimes or misdemeanors, or certain acts in relation to the transmission of estates, the capacity of persons and other objects.[61]

A statute is **permissive** when it allows certain actions to be done without commanding them.[62]

24. In respect to their nature and object, statutes are *declaratory*, *remedial*, or *penal*.

A **declaratory statute** is one that is passed in order to put an end to a doubt as to what is the common law or the meaning of another statute, and which declares what it is and ever has been.[63] It is either affirmative or negative in form.

An *affirmative statute* is one that is enacted in affirmative terms and does not necessarily take away the common law.[64]

A *negative statute* is one expressed in negative terms, or

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57 93 N. C. 602 (1885).
58 Abbott's Law Dict.
59 Abbott's Law Dict.
60 76 Va. 331 (1882).
61 1 Bouv. Inst. 109.
62 1 *Ibid.* 110.
63 Black. Comm. 86.
64 14 Ab. Pr. 125 (N. Y.) (1862).

where its matter is so clearly repugnant to the common law that it necessarily implies an abrogation of it.[65]

ILLUSTRATION.—If a statute were to provide that it should be lawful for a tenant in fee simple to make a lease for twenty-one years and that such lease should be good, an affirmative statute could not restrain him from making a lease for sixty years; but a lease for more than twenty-one years would be good, because it was good at common law; and to restrain him it ought to have words negative, as that it shall not be lawful for him to make a lease for *above* twenty-one years, or that a lease for more shall not be good.[66]

Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of judges, or from any other cause whatsoever. And this being done, either by enlarging the common law, where it was too narrow and circumscribed, or by restraining it where it was too lax and luxuriant, has occasioned another subordinate division of remedial statutes into *enlarging* and *restraining statutes*.[67]

A **penal statute** is one that imposes a penalty for transgressing its provisions, or for doing a thing prohibited.[68]

25. When Statutes Take Effect.—A statute, when duly made, takes effect from the date of its passage, when no other time is specially fixed.[69]

The expression *when duly made* signifies when it has gone through all the forms made necessary by the constitution to give it force and validity as a binding rule of conduct for the people. A statute only becomes a statute law, or "An Act," after it has passed both houses of congress or a state legislature, and received the approval of the executive official, the president or governor; before that it is merely a *bill*, or inchoate statute. So, whether an embryo act of the legislature receives the signature of the governor, or remains in his hands

[65] 23 N. J. Law 40 (1850).
[66] Potter's Dwar. St. 70.
[67] 1 Black. Comm. 86, 87; 1 Denio (N. Y.) 422 (1845); 2 Conn. 113 (1816).
[68] Bac. Abr.
[69] 7 Wheat. (U. S.) 164 (1822).

unreturned the requisite number of days, or, being vetoed, is carried by the requisite majority of both houses, its passage is dated from the time it ceased to be a mere proposition, or bill, and passed into a law.[70] In states where the constitution does not provide for executive approval of bills, an act is perfected when it has been signed by the presiding officers of the legislature.[71]

26. Ex Post Facto Laws.—The constitution of the United States provides that no state can pass any **ex post facto law.** This expression is a technical one, and means every law that makes an act done before the passing of the law, and which was innocent when done, criminal; or which aggravates a crime and makes it greater than it was when committed; or which changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; or which alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender.[72]

27. A *retrospective statute* is one that operates upon some subject, contract, or crime that existed before the passage of the act. In the United States, generally, a statute that is retrospective in its nature, affecting and changing vested rights, is void, being in conflict with the section of the federal constitution, which provides that no state shall pass any laws impairing the obligation of contracts;[73] but the doctrine does not apply to remedial statutes which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only confirm rights already existing, and in furtherance of the remedy, by curing defects, and adding to the means of enforcing existing obligations. Such statutes are valid, when clearly just and reasonable and conducive to the general welfare, even though they might operate in a degree upon existing rights.[74]

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[70] 33 Pa. 202 (1859).
[71] 47 Ohio St. 464 (1890).
[72] 1 Kent's Comm. 409.
[73] Const. U. S., Art. I, Sec. 10; 35 Mo. 174 (1864); 4 S. & R. (Pa.) 364 (1818).
[74] 1 Kent's Comm. 456, 457.

28. Unconstitutional Acts. — In all countries where there is a written constitution designating the powers and duties of the legislative as well as the other departments of the goverment, an act of the legislature may be void as being against the constitution. A statute must conform to the constitution of the United States, and to the constitution of its particular state, and, if it infringe the provisions of either, it may be declared void.

The courts of justice have the right, and are in duty bound, to bring every law to the test of the constitution, and to regard the constitution, first, of the United States, and then that of their own state, as the paramount or supreme law to which every inferior or derivative power and regulation must conform; for the judicial department is the proper power in the government to determine whether a statute be or be not constitutional. The interpretation or construction of the constitution is as much a judicial act, and requires the exercise of the same legal discretion, as the interpretation or construction of a law.[75]

29. Municipal Ordinances. — Laws passed by the governing body of a municipal corporation, for the regulation of the affairs of the corporation, are **municipal ordinances.** The term *ordinance* is the usual denomination of such an act, although in England and in some of the United States the term *by-law* is in common use as preferable to ordinance. A by-law proper is a subordinate rule for the government of the body passing it.[76] A *resolution* of a council is but another name for an ordinance, and, if it be a legislative act, it is immaterial whether it is called a resolution or an ordinance, so long as the requirements essential to the validity of an ordinance be observed; but, if the act be merely declaratory of the will of the corporation, it is proper to act by resolution, which is more in the nature of a ministerial act.[77]

The authority of ordinances passed by a municipality

[75] Kent's Comm. 449.
[76] 117 Ind. 221 (1888); 63 Iowa 372 (1884).
[77] 99 Pa. 330 (1882); 19 U. S. App. 622 (1894)

under its charter powers is derived from the state legislature, and not only from the municipality that passes them. When the power is not expressly granted to a municipality, it is implied as incident to its existence; but, in case of an express grant of the power to enact ordinances limited to certain specified cases and for certain purposes, the corporate power of legislation is confined to the objects specified, all others being excluded by implication.[78] This power cannot be construed as imparting to the municipality the right to repeal the laws in force or to supersede their operation by any of its ordinances. Nor can the presumption be indulged that the legislature intended that an ordinance passed by the city should be superior to, or take the place of, the general laws of the state on the same subject.[79]

Municipal ordinances are limited to, and can have no effect beyond, the limits of the municipality; but all persons, even non-residents, who, being themselves within the limits of the municipality, are, while there, citizens, and are governed by its laws.[80]

30. An ordinance must be general, impartial, certain, and definite, and it must not contravene the constitution, any public law, principles of public policy, or common right. If repugnant to the constitution or general laws, an ordinance is void.[81] An ordinance that gives to one sect a privilege which it denies to another is not general and impartial, and is in violation of both the constitution and the law; and where an ordinance declares some act to be an offense, it must define that offense explicitly and mention the penalty with certainty.[82]

Ordinances in restraint of trade are void, but such enactments may be made to regulate trade; they may be enacted to prevent the use of certain streets for market purposes, but they may not restrain the sale of the usual commodities that pertain to a merchant's regular calling, by prohibiting during

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78 11 S. C. 292 (1878); 33 N. H. 431 (1856).
79 12 B. Mon. (Ky.) 29 (1851).
80 6 Ired. Law (N. C.) 272 (1846).
81 23 Conn. 132 (1854).
82 26 La. Ann. 671 (1874); 49 N. J. Law 42 (1886).

market hours the sale of certain goods outside of the market limits.[83]

31. Necessary to the validity and binding effect of municipal ordinances is their passage by an organized and acting council, by the necessary majority, after the required number of readings, according to the rules, the signing and approval by the proper officers, and their publication, when required by the charter, in the manner designated.[84] Where there are mandatory laws requiring that an ordinance must be passed by a certain vote, the yeas and nays must appear on the record of the council's proceedings, except where the record shows the measure has been adopted unanimously.[85]

In some states, municipal ordinances may cover the same ground as the state law and both are enforceable. The fact that there is a general statute in force on the subject covered by an ordinance does not make further regulation unnecessary and unreasonable;[86] but, in some states, legislation by ordinance in addition to state legislation is not permitted.[87]

32. Interpretation and Construction.—A statute is the will of the legislature, and, in order to determine what intention is conveyed by the language used in any act of congress or legislature, or in a municipal ordinance, judicial *interpretation* and *construction* are often necessary.[88]

Interpretation is the act of finding out the true sense of any form of words, that is, the sense that their author intended to convey; and of enabling others to derive from them the idea that was intended to be conveyed by the author.[89]

Construction is properly the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from, and given in, the text—

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[83] 33 Ill. 416 (1864); 43 Ill. 47 (1867); 11 Pick. (Mass.) 168 (1831).

[84] 19 N. J. Eq. 412 (1869); 20 Atl. Rep. (Pa.) 424 (1890).

[85] 78 N. Y. 363 (1879); 22 Mich. 104 (1870); 89 Ill. 361 (1878).

[86] 14 Ala. 400 (1848); 36 Conn. 215 (1869); 4 Neb. 101 (1875); 23 Conn. 128 (1854).

[87] 18 Fla. 318 (1881).

[88] 1 Kent's Comm. 468.

[89] Dr. Lieber's Hermeneutics (3d Ed. by Hammond), p. 11.

conclusions that are in the spirit, though not within the letter, of the text.[90]

The terms *interpretation* and *construction* are generally synonymous, but in matters concerning statutes and written instruments, a distinction is drawn; however, the terms are used interchangeably by the courts in most cases.

If the language be clear and admit of but one meaning, there is no need of interpretation and construction.[91] There can be no departure from the plain meaning of a statute on grounds of its unwisdom or of public policy.[92]

33. Rules of Interpretation.—The first and cardinal rule in interpretation is to look at the statute itself—the meaning, the scope, and the object of the enactment—and if, upon the face of it, can be gathered plainly what the intention of the legislature was, those incidental rules that are mere aids to be invoked where the meaning is clouded are not to be regarded.[93]

The language of a statute is often ambiguous, and to adhere to its literal meaning in all cases would be to miss its real meaning in many instances; hence, the employment of interpretation and construction to discover the real meaning.

The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. These signs are the *words*, the *context*, the *subject-matter*, the *effects* and *consequences*, and the *spirit* and *reason* of the law.[94]

The natural import of the *words* is to be adopted,[95] and if technical words be used, they are, in general, to have assigned to them their technical sense.[96] Words and expressions that have acquired a definite meaning in law must be so expounded.[97]

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90 Dr. Lieber's Hermeneutics (3d Ed. by Hammond), p. 44.
91 2 Cranch (U. S.) 386 (1805).
92 11 C. B. (Eng.) 378 (1851); Sedg. St. L. (5th Ed.) 197.
93 2 Cent. Rep. (S. C. D. of C.) 694 (1886)
94 1 Black. Comm. 59; 28 Pa. 36 (1857).
95 (1891) 2 Q. B. (Eng.) 115.
96 1 Pick. (Mass.) 261 (1822).
97 2 M. & S. (Eng.) 230 (1813).

ILLUSTRATION. — No mere misnomer in the name of a natural person or corporation is fatal to the validity of an act, if the person or corporation intended can be collected from the words.[98] The word *may* means *must* or *shall* in cases where the public interest and rights are concerned.[99] A conjunction may be taken in a disjunctive sense; therefore, *and* may be construed to be *or*.[100] The term *void* in some instances has been limited to mean *voidable*, that is, to be made void by some plea or act of the party in whose favor the statutes are set up.[101]

34. The **context** is to be looked into, if the words be still dubious. Thus, the preamble is often examined closely to help the construction of the provisions of an act. Of the same nature and use is the comparison of a law with other laws made by the same legislators, that have some affinity with the subject, or that expressly relate to the same point; that is, statutes upon the same subject must be construed with reference to each other; what is clear in one statute shall be called in to explain what is obscure and ambiguous in another.[102] The intention of the lawmakers is to be sought in the entire context of the section, statutes, or series of statutes, upon the same subject;[103] the intention of a statute is to govern, even though the construction grounded upon such intention may appear to be contrary to the literal import of the words.[104]

35. The **subject-matter** is always supposed to be in the thought of the lawmaker, and all his expressions are taken as directed to that end.[105] Words of a doubtful and ambiguous meaning ought always to be understood and explained in reference to the subject-matter and the occasion on which they were used.[106]

ILLUSTRATION. — Where an English law forbids all ecclesiastical persons to purchase *provisions* at Rome, it might seem to prohibit the buying of grain or other victual; but when it is considered that the statute was made to suppress the usurpations of the papal see, and that the nominations to benefices by the pope were called provisions, it is seen upon what the restraint is intended to be laid.[107]

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[98] 3 Sumn. (U. S.) 279 (1838).
[99] 9 Port. (Ala.) 390 (1839).
[100] 19 Vt. 131 (1847).
[101] 13 Mass. 515 (1816).
[102] 1 Black. Comm. 60.
[103] 18 Wall. (U. S.) 301 (1873).
[104] 2 Pet. (U. S.) 661 (1829).
[105] 1 Black. Comm. 60.
[106] 14 N. J. Law 346 (1834).
[107] 1 Black. Comm. 60.

36. The rule as to the **effects** and **consequences** is, that where words bear either none, or a very absurd signification, if literally understood, a deviation from the received sense must be made. Therefore, where a law enacted that whoever drew blood in the streets of a city should be punished, was held not to extend to the surgeon who bled a person who fell in the street with a fit.[108]

37. By considering the **spirit** and **reason** of a law is the most universal and effectual way of discovering the true meaning of it; the preexisting law, and the reason and purpose of the new enactment, are considerations of great weight.[109] The object designed to be reached by the statute must limit and control the literal import of the terms and phrases employed.[110] From this method of interpreting laws by the reason of them arises what is called *equity*, which is treated in the next subtitle.

38. General rules as to construction are the following: (1) Statutes should be so construed, if practicable, that one section will not destroy another, but explain and support it.[111] (2) The construction should be sensible, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust and absurd conclusion.[112] (3) Penal statutes must be strictly construed, remedial ones liberally;[113] and, generally, the construction given them in the country where they are enacted will be adopted elsewhere.[114]

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[108] 1 Black. Comm. 60; 1 Yeates (Pa.) 483 (1795).
[109] 1 Black. Comm. 61; 23 Wall. (U. S.) 380 (1874).
[110] 5 Dutch. (N. J.) 99 (1860).
[111] 147 U. S. 242 (1892).
[112] 144 U. S. 47 (1891).
[113] 6 W. & S. (Pa.) 276 (1843).
[114] 120 U. S. 678 (1886); 134 U. S. 624 (1889).

EQUITY

39. Definition.—Equity is the correction of that wherein the law by reason of its universality is deficient.[115] To grasp the full meaning of *equity* there must be an understanding of the term *jurisprudence*, which is the practical science of giving a wise interpretation to the laws and making a just application of them to all cases as they arise;[116] the science of rights in accordance with positive law; the systematic knowledge of the laws, customs, and rights of men in a state or community necessary for the due administration of justice.[117]

Equity is the system of jurisprudence or body of doctrines or rules as to what is equitable and fair and what is not, by which the defects of, and the incidental hardships resulting from, the inflexibility of the forms and the universality of the rules of the common-law tribunals are corrected or remedied, and substantial justice is done.[118]

In a broad sense, equity means natural justice;[119] in its technical sense, it is a term descriptive of a certain field of jurisdiction exercised in the English system, by certain courts, and of which the extent and boundaries are not marked by lines founded upon principles so much as by the features of the original constitution of the English scheme of remedial law, and the accidents of its development.[120]

40. The principles upon which, and the modes and forms by and through which, justice is administered in the United States are derived to a great extent from those which were in existence in England at the time of the settlement of the United States.[121]

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115 1 Black. Comm. 61.
116 Bouv. Law Dict.
117 Stand. Dict.
118 Cent. Dict.
119 Snell Eq. (1st Am. Ed.) 1.
120 Bisph. Eq., Sec. 11.
121 *Ibid.*, c. I.

This system of justice was administered by the high court of chancery in England until the passage of the Judicature Acts of 1873 and 1876, when the judicial system of England was changed and the courts of law and equity were consolidated into one supreme court of judicature.

The United States federal courts have equity powers under the constitution in cases where an adequate remedy at law does not exist.[122] The equity jurisdiction conferred on the federal courts is the same as that of the high court of chancery in England; it is subject to neither limitation nor restraint by state legislation, and is uniform throughout all the different states.[123]

Courts of chancery were constituted in some states after 1776; and in Pennsylvania, a court of chancery existed for a short time as early as 1723; and in most of the colonies, before the Revolution.[124] At the present time, distinct courts of chancery exist in very few of the states. In the greater number, equity is dispensed by the courts of law according to the practice in chancery. In the other states, the distinctions between actions at law and suits in equity have been abolished, but certain equitable remedies are still administered under the statutory form of the civil action.[125]

PRINCIPLES OF EQUITY

41. The general principle on which equity is administered is that justice shall be done according to what honesty, right, good faith, and good conscience demand in every case.

In the early history of the English people it became customary for those who could not obtain redress in the courts, because no common-law action appropriate to their grievance had been sanctioned, or because the common law, while equitable and fair in its general application, was unfair in its application to their particular case, to apply to the king in parliament or in council for justice. Petitioners in

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122 Rev. Stat., Sec. 723.
123 140 U. S. 106 (1890); 150 U. S. 202 (1893).
124 Bouv. Law Dict.
125 Bisph. Eq., Sec. 15.

such cases (if it could be shown that there was no adequate remedy at law, or that the operation of the common law was unfair in its application to the particular case in hand) were referred to the chancellor (originally an ecclesiastic), the keeper of the king's conscience, who, after hearing the parties, required what was equitable and just to be done, under penalty.[126]

Distinctive principles of the courts of equity are shown by the classes of cases in which they exercise jurisdiction and give relief, allowing it to be sought and administered through process and proceedings of less formality and technicality than are required in proceedings at law.[127]

MAXIMS OF EQUITY

42. Principles of equity are to be gleaned from the apt maxims that govern in equity proceedings.

"Maxims are the foundations of the law, and the conclusions of reason." This expression has become as trite as that "maxims are the good sense of nations,"[128] or as are the maxims of equity themselves, and will always remain as logical and useful.

43. Of primary importance is: *Equity suffers no wrong without a remedy.* This is quoted as a "proud boast of equity" and as a "maxim which forms the root of all equitable decisions" in a case in which a federal court granted an injunction to prevent railroad employes from refusing to perform the contracts they engaged to perform. Where direct result of such refusal works irreparable damage to the employer and at the same time interferes with the transmission of the mail, and with commerce between the states, equity will compel them to perform the duties of the employment as long as they continue in it.[129]

But it is denied that the maxim is of universal application; that every right has a remedy, however just in

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[126] Cent. Dict.

[127] Bouv. Law Dict.

[128] 1 Plowd. (Eng.) 27 (1816); Broom Leg. Max. (8th Ed.), title page.

[129] 62 Fed. Rep. 796 (1894).

theory, it is claimed, is subordinate to positive institutions, and cannot be applied either to subvert established rules of law, or to give the courts a jurisdiction hitherto unknown; that not even courts of equity will create new remedies.[130]

44. *Equality is equity* is a maxim applied in the apportionment of moneys among creditors of insolvents and like cases. Equity is opposed to preferment of creditors, which is an infirmity of the common law. Creditors may accept preferences, but they cannot accept them in consideration of promises to further the plans of the debtor to hinder, delay, or defraud other creditors.[131]

45. *He who seeks equity must do equity* is allied to *equity aids the vigilant, not the slothful,*[132] and has the ring of the golden rule. It is more of a guiding principle of equity jurisprudence than an exact rule.

Where a complainant invokes the aid of a court of equity, it will not be granted except on equitable terms, which will be imposed as the price of the decree it gives him. The rule "decides nothing in itself"; it must first be inquired, what are the equities that the plaintiff must do in order to entitle him to the relief he seeks?[133]

46. *Equity considers that as done which ought to have been done;* the true meaning of which is, that equity will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been.[134] In order to prevent a party from profiting by his own wrong, he will be deemed to have done what he is bound to do.[135]

47. *Equity follows the law;* for whenever the rights or the situation of the parties are clearly defined and established

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130 14 R. I. 395 (1884); 150 U. S. 182 (1893).
131 151 Ill. 632 (1894).
132 Am. & Eng. Encyc. (2d Ed.), Vol. 11, p. 157.
133 90 Mo. 239 (1886).
134 31 Cal. 327 (1866).
135 130 U. S. 122 (1888); (1892) 1 Ch. (Eng.) 143.

by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim is strictly applicable.[136]

48. *Equities being equal, the law will prevail; between two parties having equal equities, the prior equity will prevail.* The ground upon which a suitor sues for relief in a court of equity is that he is entitled to it; if his adversary has an equally equitable case, the complainant has no right to relief. Where each of two parties claim the same mortgage, held by a third person who had received money for investment for each of them, if the equitable rights of the parties thereto be absolutely equal, so far as the declarations of trust in respect thereto are concerned, the party to whom an assignment of the mortgage has been made, having the legal title, will prevail.[137]

ENFORCEMENT OF THE LAW

NATURE AND ORIGIN OF SOCIETY

49. The only true and natural foundations of society are the wants and fears of individuals. Although society had not its formal beginning from any convention of individuals, actuated by their wants and fears, yet it is the *sense* of their weakness and imperfection that *keeps* mankind together, that demonstrates the necessity of this union, and that, therefore, is the solid and natural foundation of civil society.[138]

Man is by nature a social being; he is made to live in the society of other moral beings; he cannot be content in a state of solitude; he was formed for society; he is neither capable of living alone, nor has the courage to do it.[139]

In nature and reason it is always understood and implied that in the very act of associating together, the whole should protect all its parts, and that every part should pay obedience

136 15 How. (U. S.) 299 (1853).
137 15 N. Y., App. Div. 128 (1897).
138 1 Black. Comm. 47, 48, and Sharswood's notes to same.
139 *Ibid.*

to the will of the whole; that the community should guard the rights of each individual member, and that, in return for this protection, each individual should submit to the laws of the community.[140]

GOVERNMENT

50. When civil society is once formed, government at the same time results, as necessary to preserve and keep that society in order. Unless some superior be constituted to whom is granted or delegated the power to issue commands and decisions that all the members are bound to obey, they would remain in a state of nature, without any judge on earth to define their several rights, and redress their several wrongs.[141]

The English idea of the right of sovereignty is that it resides in the hands of those who make the laws; it is a granted authority. The American idea is the simple one that government is a mere agency established by the people for the exercise of those powers which reside in them—powers which are *delegated*, not granted; they are trust powers and may be revoked. It results that no portion of sovereignty resides in government. A man makes no grant of his estate when he constitutes an attorney to manage it.[142]

51. **Government,** in a political sense, signifies that form of fundamental rules by which the members of a body politic regulate their social action, and the administration of public affairs, according to established constitutions, laws, and usages.[143]

A *state*, in its broadest sense, is an independent society. The term government means that institution, or aggregate of institutions, by which that society makes and carries out those rules of action which are necessary to enable men to live in a social state, or which are imposed on the people forming a state.[144]

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[140] 1 Black. Comm. 47, 48, and Sharswood's notes to same.
[141] *Ibid.*
[142] 1 Black. Comm. 48.
[143] 37 Iowa 544 (1873).
[144] Bouv. Law Dict.

The members of a state or political community are called *citizens*. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual, as well as their collective, rights.[145] The organization of government means a surrender of a portion and the control of the reserved rights of individuals, and the power of the government to control all persons in the exercise of these reserved rights must be conceded. In the maintenance of the government and the general welfare, individual rights, whether of natural persons or corporate bodies, must yield to the public good.[146]

The government is an abstract entity, which has no hand to write or mouth to speak, and has no signature that can be recognized, as in the case of an individual. It speaks and acts only through agents, or more properly, officers. These are many, and have various and diverse powers confided to them.[147]

The theory of government is that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting on the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in such cases is not only bad in morals, but involves a public wrong. No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments.

52. De Facto Government. — A de facto government is one that unlawfully gets the possession and control of the rightful government and maintains itself there, by force and

145 92 U. S. 549 (1875).
146 102 Ill. 569 (1882).
147 7 Wall. (U. S.) 676 (1868).

arms, against the will of the rightful and legal government, and claims to exercise its powers.[148]

There are two kinds of *de facto governments*. One exists after it has expelled the regularly constituted authorities from the seats of power and the public offices, and established its own functionaries in their places, so as to represent in fact the sovereignty of the nation. So far as other nations are concerned, such a government is treated as in most respects possessing rightful authority; its contracts and treaties are usually enforced; its acquisitions are retained; its legislation is in general recognized; and the rights acquired under it are, with a few exceptions, respected after the restoration of the authorities that were expelled.[149]

The other kind of *de facto government* is one that exists where a portion of the inhabitants of a country have separated themselves from the parent state and established an independent government. The validity of its acts, both against the parent state and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it.[150] If it succeed and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation.[151]

THE UNITED STATES GOVERNMENT

53. Classification of Powers. — In the complex system of polity which exists in the United States, the powers are divided into four classes: (1) Those which belong exclusively to the states; (2) those which belong exclusively to the national government; (3) those which may be exercised concurrently and independently by both; and (4) those which

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148 43 Ala. 213 (1869). 149 96 U. S. 185 (1877). 150 96 U. S. 186 (1877).

151 The Confederate government was never acknowledged by the United States nor by other powers as a *de facto* government. No treaty was made by it with any civilized state. No obligations of a national character were created by it, binding after its dissolution, in the states which it represented, or on the national government. From a very early period of the war to its close, it was regarded simply as the military representative of the insurrection against the authority of the United States.—8 Wall. (U. S.) 9 (1868).

may be exercised by the states, but only until congress shall see fit to act upon the subject.[152]

In the political system of the United States there is a government of the United States and a government of each of the several states. Each of these governments is distinct from the other, and each has citizens of its own who owe it allegiance and whose rights, within its jurisdiction, it must protect.[153]

The people of the United States resident within any state are subject to two governments, one state and the other national; but there need be no conflict between the two. The power that one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of their rights at home and abroad.[154]

The government of the United States is one of delegated powers alone. Its authority is defined and limited by the constitution. All powers not granted to it by that instrument are reserved to the states or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the states.[155]

The special powers thus delegated are principally such as concern the foreign relations of the country, the rights of war and peace, the regulation of foreign and domestic commerce, and other objects most appropriately assigned to the general government. The government invested with the exercise of these powers is distributed into *legislative*, *executive*, and *judicial departments*.

54. The **legislative power** is divided into two branches; a senate, composed of two senators from each state, chosen for six years by the legislature thereof, at present consisting

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[152] 17 Wall. (U. S.) 568 (1873).
[153] 92 U. S. 549 (1875).
[154] *Ibid.*, p. 550.
[155] 92 U. S. 551 (1875).

of ninety members; and a house composed of representatives, chosen for two years, from each state in proportion to their respective populations (excluding Indians not taxed) based on an apportionment made from time to time. The number of representatives shall not exceed one member for every thirty thousand.[156] The present membership of the national house of representatives is three hundred and eighty-six, with the addition of one delegate from each of the territories of Arizona, Hawaii, New Mexico, and Oklahoma, who have seats and the right of debating, but not of voting.

55. The **executive power** is vested in a president, who, together with the vice-president, is chosen by electors appointed in such manner in each state as its legislature may direct, every four years, each state being entitled to as many electors as it has senators and representatives, the electors being appointed by the people by voting a general ticket throughout each state.[157]

56. The **judicial power** is vested in a supreme court and such inferior courts as may be established by congress from time to time, the judges receiving their appointment from the president by and with the advice and consent of the senate, and holding their offices by the tenure of good behavior.[158]

The various states are representative democracies. The legislative functions are vested in two separate bodies, differently constituted, a senate and a house of representatives, whose concurrence is required to the passage of laws, and a qualified veto is generally allowed to the governor, the executive power of each state, who is chosen by direct vote of the people.

57. A **municipal corporation** is an incorporated city, town, or borough; a body politic specially chartered by the state or organized under a general legislative act, for the purpose of local government subsidiary to that of the state,

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156 Const. U. S., Art. I, Sec. 2.
157 Const. U. S., Art. II, Sec. 1, Cls. 1 and 2.
158 Const. U. S., Art. III, Sec. 1.

and having subordinate and local powers of legislation.[159] In England, it is a similar body which has acquired governmental powers and privileges by prescription.[160] Being the creature of the law by which it is chartered or organized, a municipal corporation can act only in the manner provided by its organic law, and if its agents fail to observe the forms and methods prescribed by that law in any substantial particular, their acts are not the acts of the municipality.[161]

In the exercise of all its duties, including those most strictly local or internal, a municipal corporation is but a department of the state. It may act through its mayor, or its legislative department, by whatever name called, its superintendent of streets, commissioner of highways, or board of public works, provided the act be within the province committed to its charge. It is immaterial by what means these several officers are placed in their position—whether they are elected by the people of the municipality, or appointed by the president or a governor.[162]

THE ENGLISH GOVERNMENT

58. In *England*, the supreme power is divided into two branches, the one *legislative*, the parliament consisting of the king, lords, and commons; and the other *executive*, consisting of the king alone.[163]

The constituent parts of a parliament are, the king's majesty, sitting in his royal political capacity, and the three estates of the realm, the lords spiritual, and the lords temporal (who sit together with the king in one house), and the commons, who sit by themselves in another; and the king and these three estates, together, form the great corporation or body politic of the kingdom, of which the king is head, leader, and end. For, upon their coming together, the king meets them either in person or by representation, without which there can be no beginning of a parliament; and he alone has the power of dissolving them.[164]

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159 19 Wall. (U. S.) 475 (1873).
160 1 Salk. (Eng.) 183 (1698).
161 16 Blatchf. (U. S.) 193 (1879).
162 91 U. S. 545 (1875).
163 1 Black. Comm. 146, 147.
164 *Ibid.* 153.

59. Legislative.—The **house of lords** consists of twenty-six lords spiritual (archbishops and bishops) and five hundred and thirty-four lords temporal; but the number is liable to vary. Although the lords spiritual are, in the eye of the law, a distinct estate from the lords temporal, and are so distinguished in most of the acts of parliament, yet, in practice, they are usually blended together under the one name of the lords; they intermix in their votes, and the majority of such intermixture joins both estates.

The **lords temporal** consist of all the peers of the realm (the bishops not being in strictness held to be such, but merely lords of parliament), by whatever title of nobility distinguished—dukes, marquises, earls, viscounts, or barons. Some of these sit by descent as do all ancient peers; some by creation, as do all new-made ones; others by election. Their number is indefinite, and may be increased at will by the power of the crown.

The **house of commons** consists of all such men of property in the kingdom as have not seats in the house of lords, every one of whom has a voice in parliament. It is composed of six hundred and seventy members elected by the people; four hundred and ninety-five from England and Wales, seventy-two from Scotland, and one hundred and three from Ireland.[165]

60. Executive.—The **crown** cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses. Therefore, the legislature cannot abridge the executive power of any rights which it has by law, without its own consent; since the law must perpetually stand as it now does, unless all the powers will agree to alter it, and herein consists the unique character of the English government, that all the parts of it form a mutual check upon each other. In the legislature, the people are a check upon the nobility, and the nobility a check upon the people, by the mutual privilege of rejecting what the other has resolved; while the king is a check

[165] 1 Black. Comm. 158

upon both, which preserves the executive power from encroachments, and this very executive power is again checked and kept within due bounds by the two houses. Thus, every branch of civil polity supports and is supported, regulates and is regulated, by the rest; for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, mutually keep each other from exceeding their proper limits; while the whole is prevented from separation and artificially connected together by the mixed nature of the crown, which is a part of the legislative, and the sole executive magistrate.

THE DOMINION OF CANADA

61. The confederation of the North American dependencies of Great Britain, under the name of the **Dominion of Canada,** was consummated in 1867, by an act of the imperial parliament, at the instance and request of the different provinces, including Upper and Lower Canada (under the names of Ontario and Quebec), New Brunswick, and Nova Scotia, to which have since been added Prince Edward's Island, Manitoba, and British Columbia.[166]

The act under which this confederation was established, called the British North American Act, contains the provisions of a written constitution, under which the executive government and authority is declared to be vested in the sovereign of Great Britain, whose powers are deputed to a governor-general, nominated by the imperial government, but whose salary is paid by the dominion.

The form of government is modeled after that of Great Britain. The governor-general acts under the guidance of a council, nominally selected by himself, but which must be able to command the support of a majority of that branch of parliament which represents the suffrages of the electors.

The parliament consists of a senate and house of commons, the former numbering from seventy-two to seventy-eight members, appointed for life. The house of commons

[166] Bouv. Law Dict.

consists of over two hundred members, distributed about as follows: Ontario, ninety-two; Quebec, sixty-five; Nova Scotia, twenty; New Brunswick, fourteen; Manitoba, seven; British Columbia, six; Prince Edward's Island, five.[167]

The privileges, immunities, and powers of the senate and house of commons are within the control of the parliament of Canada, that is, of the three united branches, the king (governor-general), senate, and commons.

Each of the provinces has also a separate parliamentary organization for the administration of local affairs, with a lieutenant-governor for each, appointed for a term of five years by the governor-general in council.

COURTS

62. A **court** is a tribunal for the public administration of justice; a body of the government to which the administration of justice is delegated.[168] It is constituted by the presence of a judge or judges, a clerk to record and attest the actions or proceedings and the decisions of the tribunal, attorneys and counsel to present and manage the business, and ministerial officers to execute its covenants and preserve order during its sessions, or sittings, which are held at times and places fixed by law.

The words *judge* and *court* are frequently used as convertible terms, but properly speaking this is incorrect. The judge is a constituent part of the organization, but he is not the court. Nor is the court room the court, nor the jury room, nor the petit jury. The court is the totality of the constituent parts. It consists of the entire judicial organization for the trial of causes, and it is immediately present whenever and wherever—from the opening to the adjournment of the sitting—these constituent parts are actually performing the functions devolving upon them by law.[169]

A **court term** is a definite and fixed term, prescribed by law for the administration of judicial duties, within which

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167 Stat. of Can. (1892), p. 62.

168 18 Mo. 570 (1853); 130 Ill. 114 (1889).

169 18 Civ. Proc. R. (N. Y.) 230 (1890); 19 Cal. 170 (1861).

the business of the term should be transacted. Court terms may be, and frequently are, extended to a period of time beyond their limits. A court regularly convened continues open until actually adjourned.[170]

63. The general classification of all courts is *courts of record* and *courts not of record*. As to jurisdiction there are civil courts; criminal courts; probate courts; appellate courts; supreme, superior, and inferior courts; courts of law and courts of equity; courts of general and courts of limited or special jurisdiction; provisional courts; courts martial; besides innumerable other minor and distinct courts.

It is within the scope of this subject to briefly explain the first general classification and to treat generally of the other classes. The principal systems of countries and states are so different that a description in detail of each class will not be attempted.

DEFINITIONS

64. A **court of record** is one whereof the acts and judicial proceedings are enrolled for a perpetual memorial and testimony, which rolls are called the records of the court, and are such high and supereminent authority that their truth is not to be called in question.

Courts not of record were formerly defined as tribunals of inferior dignity, the proceedings of which were not enrolled. But, really, the proceedings of every court are recorded in some form, and the old distinction of courts of record and courts not of record, once effective in the days of courts-baron, in England, is now of no general consequence.[171]

Courts of record have an inherent power to make rules for the transaction of their business, provided they do not contravene the laws of the land. Without this power, it would be impossible for courts of justice to despatch the public business. Delays would be interminable, and delay not infrequently is the object of one of the parties. All courts, therefore, must have stated rules to go by,

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[170] 38 Pa. 270 (1861); 53 Barb. (N. Y.) 412 (1867).

[171] 34 Cal. 422 (1868).

and they are the most proper judges of their own rules of practice.[172]

Courts of law are those which administer justice according to the principles of the common law. In *courts of equity*, the proceedings are wholly according to the principles of equity.[173]

Courts of general jurisdiction are those which take cognizance of all causes, civil or criminal, of a particular nature. *Courts of limited or special jurisdiction* are those which have jurisdiction over a few matters only.[174]

A **civil court** is a tribunal instituted for the enforcement of private rights and the redress of private wrongs. A *criminal court* is one for the redress of public wrongs, crimes, and misdemeanors.[175]

An **inferior court** is one which is subordinate to another or is of limited jurisdiction.[176]

A **superior court** is one with controlling authority over some other court or courts, and with certain original jurisdiction of its own.[177]

A **supreme court** is a tribunal of the highest jurisdiction; also, a court higher than some other court or courts, but not necessarily of last resort.[178]

Provisional courts are tribunals which are temporarily established in conquered territory by military authority.

A **court martial** is a military or naval tribunal, which has jurisdiction of offenses against the law of the service, military or naval, in which the offender is engaged.[179]

Appellate courts are those which take cognizance of cases removed from another court by appeal or writ of error.[180]

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172 8 S. & R. (Pa.) 339 (1822); 1 Pet. (U. S.) 604 (1828).
173 Anderson's Law Dict.
174 *Ibid.*
175 *Ibid.*
176 *Ibid.*
177 *Ibid.*
178 *Ibid.*
179 Bouv. Law Dict.
180 *Ibid.*

JUDICIAL POWER IN THE UNITED STATES

65. The **judicial power** of the United States is vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish.[181]

The judicial power extends to all cases in law and equity, arising under the constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and a citizen of another state; between citizens of different states; between citizens of the same state claiming land under grants of different states; between a state or the citizens thereof, and foreign states, citizens, or subjects.[182]

The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise provide, are to be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.[183] Included in these are the rules of evidence prescribed by the laws of the states in which the United States courts sit.[184]

The remedies in the federal courts at common law or in equity are not according to the practice of the state courts, but according to the principles of common law and equity as distinguished and defined in England, from which knowledge of these principles is derived.[185]

66. The United States courts have exclusive jurisdiction in the following cases and proceedings:[186] (1) Of all crimes and offenses cognizable under the authority of the United States; (2) of all suits for penalties and forfeitures incurred under the laws thereof;[187] (3) of all civil causes of admiralty

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181 Const. U. S., Art. III, Sec. 1.
182 Const. U. S., Art. III, Sec. 2, Cl. 1.
183 U. S. R. S., Sec. 712.
184 102 U. S. 165 (1880).
185 6 Wall. (U. S.) 137 (1867); 100 U. S. 103 (1879).
186 U. S. R. S., Sec. 711.
187 2 Dall. (U. S.) 365 (1796); 47 Me. 242 (1877).

or maritime jurisdiction, saving to suitors the right of such remedy as the common law is competent to give; (4) of all seizures under federal law not within admiralty and maritime jurisdiction; (5) of all cases arising under patent right or copyright laws;[188] (6) of all matters in bankruptcy;[189] (7) of all controversies of a civil nature where a state is a party, except between a state and its own citizens, citizens of other states, or aliens.[190]

As at present constituted, the federal tribunals are the supreme court, the circuit court of appeals, circuit courts, district courts, territorial courts, supreme court of the District of Columbia, and the court of claims.

SUPREME COURT

67. The **supreme court** of the United States has original jurisdiction in all cases affecting ambassadors, other public members and consuls, and those in which a state is a party.[191] It may also issue writs of mandamus, habeas corpus, and prohibition in certain specified cases.[192]

In the following cases, appeals and writs of error may be taken directly to the supreme court from the federal, circuit, or district courts:

(1) In any case that involves the construction or application of the constitution of the United States; (2) in any case in which the constitutionality of any law of the United States or the validity or interpretation of any public treaty is concerned; (3) where the constitution or law of a state is alleged to be at variance with the federal constitution; (4) in convictions of capital or other infamous crimes;[193] (5) where the jurisdiction of the court is in question;[194] and (6) from the final decrees and sentences in prize causes.

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188 7 Johns. (N. Y.) 145 (1810); 47 N. Y. 535 (1872).
189 119 Mass. 434 (1876).
190 29 Ark. 649 (1874).
191 3 Pet. (U. S.) 461 (1830); 2 Dall. (U. S.) 402 (1792).
192 U. S. R. S., Secs. 688, 751; 142 U. S. 651 (1891).
193 140 U. S. 200 (1890).
194 141 U. S. 661 (1891).

CIRCUIT COURT OF APPEALS

68. The act of congress under which the **circuit court of appeals** was created,[195] provides for the distribution of the entire appellate jurisdiction of the national judicial system between the supreme court and the court of appeals, by designating the classes of cases in respect of which each of those two courts should respectively have final jurisdiction. Its jurisdiction extends to all those appeals or writs of error from the district and circuit courts which are not directly appealable to the supreme court. The amount involved in the suit is immaterial, if the case be otherwise within the jurisdiction of the court.

CIRCUIT COURTS

69. The jurisdiction of the **circuit courts** is such as congress confers.[196] In general, its cognizance extends to civil suits involving more than two thousand dollars, exclusive of both interest and costs, and arising under the constitution, laws or treaties of the United States, or in which the United States are plaintiffs, or in which the controversy is between different states, or citizens of a state and foreign states, citizens and subjects.[197]

Included in its jurisdiction are cases arising under laws providing for internal revenue, postal laws, patent and copyright laws; proceedings for penalties incurred by a merchant vessel in carrying passengers; suits by or against a national banking association; matters involving the elective franchise and other civil rights belonging to citizens of the United States; also, jurisdiction of all crimes and offenses cognizable under the authority of the United States, except when otherwise provided, and concurrent jurisdiction with district courts of offenses cognizable therein.[198] There are nine circuits in the United States, each of which is within the jurisdiction of a circuit court.

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[195] Act of March 3, 1891, c. 517; 141 U. S. 664 (1891); 48 Fed. Rep. 850 (1891); 26 Stat. at L. 826.

[196] 18 Wall. 577 (1873).

[197] Anderson's Law Dict.

[198] U. S. R. S., Sec. 629; Act of March 3, 1875, 18 Stat. at L. 470.

DISTRICT COURTS

70. Each state consists of one or more districts, which has a **district court.** This tribunal has jurisdiction over all admiralty and maritime causes, all proceedings in bankruptcy, and all penal and criminal matters cognizable under the laws of the United States, exclusive jurisdiction over which is not vested in the circuit or supreme courts. This jurisdiction comprises: All crimes cognizable under the authority of the United States committed within their respective districts or upon the high seas; cases of piracy when no circuit court is held in the district; suits for penalties and forfeitures incurred under any law of the United States; suits at common law brought by the United States or by any officer thereof authorized by law to sue; suits in equity to subject realty to the payment of internal revenue tax; suits for forfeitures or damages to, as debts due to, the United States; causes arising under the postal laws; civil causes in admiralty and maritime law; offenses against civil rights; suits by or against any national bank within the district; suits by aliens for civil injuries in violation of the law of nations or of a treaty; and certain suits against consuls or vice-consuls.[199]

TERRITORIAL COURTS

71. The various territories are provided with courts which combine the powers of both state and federal tribunals.

The supreme court of the District of Columbia has the same jurisdiction as circuit and district courts, and in addition may take cognizance of divorce cases.

The **court of claims** is the tribunal in which the government may be sued. Its jurisdiction extends to all claims founded upon any law of congress; any relation of an executive department; any contract, express or implied, with the government; to claims referred to it by either house of congress; to set-offs, counter claims, claims for damages, and other claims on the part of the United States.[200]

[199] U. S. R. S., Sec. 563.

[200] U. S. R. S., Sec. 1,059.

STATE COURTS

72. There is no uniformity among the states as to the number, name, or organization of the courts. Each state has some tribunal of last resort with numerous subordinate tribunals, but the mode in which they are created, the extent of their jurisdiction, the selection of the judges, and their terms of office and duties, are matters which each state creates and regulates by legislation.

The **state courts** are a supreme court; court of appeals, or court of errors and appeals; courts of common pleas; county courts, or circuit courts for one or more counties; orphans', probate, or surrogate courts; courts of session; recorder's courts; city courts; superior courts; district courts; courts of oyer and terminer and general jail delivery (in Pennsylvania and Delaware); courts of quarter sessions (in Pennsylvania); aldermen's, magistrates', and justices' courts.

COURTS IN ENGLAND

73. In England, one **supreme court of judicature,** with two divisions, was made by statute, by consolidating the superior courts.[201] These divisions are the *high court of justice* and the *court of appeal*, the former of which has original and some appellate jurisdiction, and the latter appellate and some original jurisdiction. The lord chief justice is president of the former court, and the lord chancellor, of the latter. The courts transferred to the high court of justice are the high court of chancery, queen's bench, common pleas, exchequer, admiralty, probate, divorce, and the assize court.

To the court of appeal was given the jurisdiction exercised by the lord chancellor and lords justice of the court of appeal in chancery, the court of exchequer chamber, the judicial committee of the privy council on appeal from the high court of admiralty, or from any order in lunacy made by the lord chancellor, or any other person having jurisdiction in

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[201] Stats. of 36 and 37 Vict., c. 66, and 38 and 39 Vict., c. 77, which went into force Nov. 1, 1875, with amendments in 1879 and 1881.

lunacy. The court of appeal practically takes the place of exchequer chamber in appeals in common-law actions, and also hears appeals in chancery previously heard by the chancellor or by the court of appeal in chancery, in the exercise of its appellate jurisdiction, and of the same court as a court of appeal in bankruptcy. It consists of five *ex-officio* judges, viz., the lord chancellor as president, the lord chief justice of England, the master of the rolls, the president for the time being of the probate, divorce, and admiralty division of the high court of justice, and five ordinary judges of the court of appeal, styled lord justices of appeal, the first three of whom are constituted by the transfer of three judges from the high court of justice.[202] Throughout the united kingdom, there are also county courts and inferior courts, concerning which detailed treatment is unnecessary.

JUDICIAL POWER OF CANADA

74. The courts of Canada are a *supreme court*, with ultimate jurisdiction in matters affecting the dominion and as a final court of appeal from the provincial courts; it consists of a chief justice and five other judges of inferior rank, and holds three sessions at Ottawa: an *exchequer court*, presided over by the same judges, which may hold sessions at any town, and is a *colonial court* of admiralty and exercises admiralty jurisdiction throughout Canada and its waters. Certain local judges of admiralty are created with limited jurisdiction, from whose decisions an appeal lies to the exchequer court, or to the supreme court under certain conditions.[203]

There are, also, courts in the various provinces called *provincial courts*, in which litigants in cases involving amounts exceeding two thousand five hundred dollars may appeal either to the supreme court, or to the king or privy council, the decision of either being final.[204]

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202 Bouv. Law Dict. (Rawle's Ed., 1897), p. 37.

203 Stat. of Canada (1891).

204 *Ibid.*

SUITS

75. The term **suit** is of comprehensive signification, and applies to any proceeding in a court of justice in which a person pursues the remedy which the law allows him to recover a right or redress an injury.[205] The modes of proceeding may be various, but if a right be litigated between the parties in a court of justice, the proceeding by which the decision of the court is sought is a suit.[206]

In its most extended sense the word *suit* includes not only a civil action but also a criminal prosecution.[207] Usually, the words *suit* and *action* are synonymous, although the term suit is of more general meaning, and is indefinitely applied to proceedings in law as well as equity, while the word action is applicable to proceedings at law.[208] The term *cause* is, also, used to denote a suit or action. Cause, properly, signifies any question, civil or criminal, contested before a court of justice. *Cause of action* is the matter, or reason, for which a suit may be brought. A cause of action is said to accrue to a person when that person first comes to the right to bring an action.[209]

To *commence suit* is to demand something by the institution of process in a court; and to *prosecute the suit* is to continue that demand.[210]

CONFLICT OF LAWS

76. The expression **conflict of laws** means the contrariety of laws of different places upon the same subject; the doctrine which treats of the proper application of the contrary laws of different countries or states (jurisdictions) to matters or cases which may be affected by, or subject to, the laws of both jurisdictions.

Where, as between the laws of two states or countries, each is sought to be applied in preference to the other, upon a controversy on facts occurring without the jurisdiction in which redress is sought, the existing condition is a conflict

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205 10 Ill. App. 333 (1882).
206 2 Pet. (U. S.) 464 (1829).
207 11 Fed. Rep. 251 (1882).
208 10 Ill. App. 333 (1882).
209 102 Ill. 272 (1882).
210 6 Wheat. (U. S.) 408 (1821).

of laws. In international matters, the doctrine treats of the opposition between the laws of different countries, where the subjects of one country may have acquired rights, and become subject to duties, within the jurisdiction of another country.[211]

As a term of art, *conflict of laws* includes the deciding which law is, in such cases, to have superiority. It, also, includes cases where there is no opposition between two systems of law, but where the question is how much force may be allowed to a foreign law with reference to which an act has been done, either directly or by legal implication, in the absence of any domestic law exclusively applicable to the case.[212]

The laws of every state affect and bind directly all property, real or personal, situated within its territory, all contracts made and acts done, and all persons resident within its jurisdiction, and are supreme within its limits by virtue of its sovereignty.[213] Whatever force and obligation the laws of one country have in another depend upon the laws and municipal regulations of the latter, that is, upon its own proper jurisprudence and polity, and upon its own express or tacit consent.[214]

77. When a statute or the common law of a country forbids the recognition of the foreign law, the latter is of no force in that country; when the recognition of the foreign law is neither forbidden nor permitted by either the statute or common law, the question is, which of the conflicting laws (if they do conflict) is to have effect.[215]

As between nations and states, the laws of one will be recognized and executed in another, where the rights of individuals are concerned, where those laws are not prejudicial or oppressive to the rights and interests of the state or nations recognizing them.[216] This practice is called *comity of nations*, and will not be conceded when the laws of

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211 2 Kent's Comm. 110.
212 1 Bouv. Law Dict. (Rawle's Ed.) 392.
213 7 Wall. (U. S.) 151 (1868).
214 Huberus, liber 1, title 3, Sec. 2.
215 Story Confl. L. 23.
216 13 Pet. (U. S.) 519, 589 (1839).

the foreign state or nation are contrary to its policy or prejudicial to its interests.[217]

The rules governing the conflict of laws in matters of contract, property, negotiable instruments, and other subjects treated herein, are considered under their appropriate titles.

[217] 37 Mo. 350, 354 (1866); 142 Mass. 53 (1886).

THE LAW OF PERSONAL RIGHTS

INTRODUCTION

1. All rights which appertain to man are of one of two classes, *natural rights* or *acquired rights*. The former belong originally and essentially to man, such as are inherent in his nature, and which he enjoys as man independent of any particular act on his side. The latter are those which are owing to his own procurement. The right of providing for one's preservation is of the one class; sovereignty, or the right of commanding, or the right of property, is of the other class.[1]

The term **man,** in its extended sense, includes all human beings, or any human being, whether male or female; mankind, generally, of whatever sex, or whether adults or children. But where, by any constitutional or statute law, the voting franchise is given to a man, or male, possessing the necessary qualifications, *man* is used in the ordinary or strict sense and does not include *woman*.

PERSONS

2. The word **person,** ordinarily in legal signification, includes both sexes.[2] Under the phrase "every person of full age," in a statute, women are comprised. The term *personal*, as applied to rights, such as security, liberty, and property, is taken as meaning mankind generally. Persons are *natural* or *artificial*.[3]

3. **Natural persons** are such as the God of nature formed all human beings. **Artificial persons** are such as

[1] 11 Ark. 519 (1851). [2] 74 Ga. 795 (1885). [3] 1 Black. Comm. 123.

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are created by human laws for the purpose of society and government; such as bodies politic, or corporations, which derive their existence from legislation.[4] Another division of natural persons is into *public* and *private*.

4. Public persons are those occupying official public offices; all others are **private persons.** Private persons are subdivided into *natives* and *aliens*. A **native** is a person born within the jurisdiction and allegiance of a given country, or government. An **alien** is one who resides in one country but who owes allegiance to a foreign country, or government; an unnaturalized resident foreigner.

5. Citizens and Aliens.—A **citizen** is one who owes allegiance to a government and is entitled to protection from it; opposed to alien.[5] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.[6]

A person cannot be a citizen of a state without being a citizen of the United States; but one may be a citizen of the United States without being a citizen of any particular state, as, for instance, an inhabitant of the District of Columbia.[7] As a rule, however, citizenship in a state consists of citizenship of the United States with a fixed abode in the state. The right to vote, or to hold office, is not a test of citizenship, for minors and women are commonly citizens without those rights, and there are cases where aliens may hold office.

In the United States and in England, the children of aliens born in either country, other than those of foreign ambassadors, are native-born citizens; in France, such children are aliens.

6. An alien, while in the United States, is under its protection, and is permitted to trade and conduct business, also, to sue and to be sued, and, according to the later statutes, to hold property both real and personal in the same manner as a

[4] 94 U. S. 315 (1876).
[5] Stand. Dict.
[6] Const. U. S., Amendt. XIV.
[7] 4 Dill. (U. S.) 425 (1876); Cent. Dict.

native; he is not, however, permitted to hold any public office,[8] nor is he generally permitted to vote; but in some states, persons who have declared their intentions to become citizens are eligible to elective offices. A state cannot make a subject of a foreign government a citizen of the United States. That can only be done in the manner provided by the naturalization laws of congress.[9]

Other divisions of persons are *adults* and *infants*, *master* and *servant*[10] (which are treated under their appropriate titles), and *sane* and *insane*.

7. Sane and Insane Persons.—A **sane person** is one who has sound mind, memory, and understanding. Sanity is the reverse of insanity; the sanity of a person is always presumed.[11]

Insane persons are those of an unsound or deranged mind. The word *insane* is not confined in its application to persons who are wholly without understanding. It includes all persons who are *non compos mentis* (not of sound mind, memory, or understanding), which is the general term including idiocy, lunacy, and other madness, without regard to the cause or duration of the malady.[12]

A **lunatic** is a person who has possessed reason but has lost it through disease, grief, or other cause; one whose unsoundness of mind is acquired, not congenital, as distinguished from an idiot.[13]

An **idiot** is one who has been without understanding from his nativity; total idiocy is total fatuity from birth.[14]

The extent to which insane persons may enjoy their natural or acquired rights, or may contract, will be shown in the treatment of the various subjects in this Course.[15] In the present inquiry, it is intended merely to explain their classification.

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[8] 30 Cal. 185 (1866).
[9] 4 Dill. (U. S.) 425 (1876).
[10] See *The Law of Parent and Child* and *The Law of Master and Servant*.
[11] 5 Johns. (N. Y.) 144 (1809).
[12] 34 Wis. 117 (1874); 104 Ind. 282 (1885); 97 Ill. 338 (1881).
[13] Cent. Dict.
[14] 63 Iowa 152 (1885); 2 Phill. Eccl (Eng.) 69 (1812).
[15] See *The Law of Contracts*, *The Law of Commercial Paper*, and other subjects.

RIGHTS OF PERSONS

8. Personal rights, or the rights of persons considered in their natural capacities, are either *absolute*, such as belong to particular men, merely as individuals; or *relative*, which are incident to them as members of society and standing in various relations to each other.[16]

9. Absolute rights of individuals are those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy whether out of society or in it.[17]

Human laws define and enforce as well those rights which belong to a man considered as an individual, as those which belong to him considered as related to others. For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence, it follows that the first and primary end of human laws is to maintain and regulate the absolute rights of individuals.[18]

The *absolute duties* which a man is bound to perform, considered as a mere individual, are not the concern of municipal laws, which, in their end and intent, are only to regulate the behavior of mankind as they are members of society, and stand in various relation to each other. If a man have vices and make them public, and they become, by his bad example, of pernicious effect to society, it is the business of human laws to correct them.[19]

PRIMARY PERSONAL RIGHTS

10. Primary personal rights are the *right of personal security*, the *right of personal liberty*, and the *right of private property*.[20]

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[16] 1 Black. Comm. 123.
[17] *Ibid.* 124.
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.* 129. The right of private property is considered under *The Law of Property*.

The right to preserve life is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property and, as such, merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies, to a large extent, at the foundation of most other forms of property.[21]

11. Right of Personal Security.—This consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.[22]

Life is the immediate gift of God, a right inherent by nature in every individual. Life in contemplation of law does not begin at birth; an unborn child has legal rights, for it is a heinous misdemeanor to injure a woman who is pregnant with a child.[23]

A man's limbs are also the gift of the wise Creator, to enable him to protect himself from external injuries in a state of nature. To these, therefore, he has natural inherent right, and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty. Both the life and limbs of a man are of such high value, in the estimation of the law, that it pardons even homicide if committed in self-defense, or in order to preserve them. For whatever is done by a man to save either life or member is looked upon as done upon the highest necessity and compulsion.[24]

The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with everything necessary for their support. This natural life cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority;

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[21] 16 Wall. (U. S.) 127 (1872).
[22] 1 Black. Comm. 129; 56 N. Y. 587 (1874); 53 N. H. 406 (1873).
[23] 1 Black. Comm. 130.
[24] *Ibid.*

but it may be forfeited for breach of the laws of society enforced by the sanction of capital punishment, although no one shall be deprived of his life but by the lawful judgment of his equals and by due process of law.[25]

12. A constitutional vouchsafement in the United States is that no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[26]

Besides those limbs and members that may be necessary to a man in order to defend himself, the rest of his person or body is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating, and wounding, though such insults amount not to destruction of life or member.

13. The *preservation of a man's health* from such practices as may prejudice or annoy, which is one of the paramount objects of government, is a right to which every man is entitled.[27] Therefore, the law will restrict a nuisance, which is anything wrongfully done or permitted that imposes or annoys one in the enjoyment of his legal rights;[28] as depositing noxious matter on the land of another, polluting well water, letting water accumulate and stagnate near another's premises.[29]

For the preservation of the general health, the law will regulate the inspection of the sanitary condition of lodging houses, dwellings, factories, workhouses, mines, cemeteries, and hospitals, and prevent the carrying on of any offensive business.[30]

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[25] 1 Black. Comm. 131-134.
[26] Const. U. S., Amendt. V.
[27] 1 Black. Comm. 134; 133 Ill. 465 (1891).
[28] Am. & Eng. Encyc. of Law (1st Ed.), Vol. 16, p. 924 (note).
[29] 52 Ga. 435 (1874).
[30] 111 U. S. 756 (1883); 97 U. S. 659 (1878).

14. The *security of a man's reputation* or good name from the arts of detraction and slander are rights to which every man is entitled by reason and natural justice; since, without these, it is impossible to have the perfect enjoyment of any other advantage or right.[31]

15. Defamation is the speaking or writing of words of a person which detract from his reputation or good fame.[32] Written defamation is termed *libel*, and oral defamation, *slander*.[33] The provisions of the law in respect to defamation, written or oral, are those of a civil nature, which give a remedy in damages to an injured individual; or of a criminal nature, which are devised for the security of the public.[34]

16. Right of Personal Liberty.—Personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law.[35]

17. Civil liberty is natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general welfare of the public. It is the liberty of a member of society. That constitution or form of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.[36]

18. Political liberty is the security with which, from the constitution, form, and nature of the established government, the people enjoy civil liberty.[37]

Every citizen of the United States and every citizen of each state, as an attribute of personal liberty, has the right, ordinarily, of free transit from or through the territory of any

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[31] 1 Black. Comm. 134.

[32] Bouv. Law Dict.

[33] The scope of our treatment of this subject does not lead into instruction concerning remedies for wrongs. Hence, defamation by libel or slander, which is regulated by statute in most jurisdictions, is simply chronicled to point the violation of security of reputation.

[34] Heard, L. & Sl., Sec. 1.

[35] 1 Black. Comm. 134.

[36] *Ibid.* 124, 126.

[37] *Ibid.* 126 (note).

state. This freedom of egress and ingress is guaranteed to all by the clearest implication of the federal and state constitutions.[38]

In England, whence our system of jurisprudence was derived, the right to personal liberty depends not on any express statute, but is the birthright of every freeman. The confinement of the person in any way is an *imprisonment*, so that keeping a man against his will in a private house, arresting or forcibly detaining him in the street, is an imprisonment.

19. Another right of every citizen is that of applying to the courts of justice for redress of injuries. Since the law is the supreme arbiter of every man's life, liberty, and property, courts of justice must, at all times, be open to the people and the law be duly administered therein.[39]

In the United States, in all criminal prosecutions, the accused shall enjoy the right (guaranteed by the federal constitution) to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.[40] Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.[41]

20. Other constitutional rights, in the United States, are the *right to vote*, which shall not be denied or abridged, by the United States or any state, on account of race, color, or previous condition of servitude;[42] the *rights of conscience*—the right to worship the Supreme Being according to the dictates of the heart, to adopt any creed or hold any opinion whatever on the subject of religion, and to do or forbear to do any act for conscience' sake, the doing or forbearing of which is not prejudicial to the public weal;[43] the *right to*

[38] 71 Ala. 499 (1882).
[39] Const. Pa., Art. I, Sec. 11, and constitutions of other states.
[40] Const. U. S., Amendt. VI.
[41] Const. U. S., Amendt. VIII.
[42] Const. U. S., Amendt. XV.
[43] 17 S. & R. (Pa.) 155 (1827).

keep and bear arms, a well-regulated militia being necessary to the security of a free state.[44]

21. The **right to bear arms** for the common defense does not mean the right to bear them ordinarily or commonly for individual defense, but has reference to the right to bear arms for the defense of the community against invasion or oppression. A citizen has, at all times, the right to keep the arms of modern warfare and to use them in such manner as they may be capable of being used, without annoyance and hurt to others, in order that he may be trained and efficient in their use. Nevertheless, a state can regulate by statute the use of such arms as to manner, time, or place, due regard being had to the right to keep and bear them for the constitutional purpose; but the right to keep and bear arms cannot be absolutely prohibited.[45]

22. Liberty of Speech and of the Press.—Within the comprehensive scope of the term **liberty** is *liberty of speech*, the right to speak facts and express opinions; and *liberty of the press*, the right to print and publish the truth from good motives and for justifiable ends.[46]

In the United States, these liberties are protected by the federal and state constitutions, which provide that no law shall be made abridging freedom of speech or of the press,[47] but every citizen is responsible for the abuse thereof.[48]

23. Liberty of the press means not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords.[49]

In England, a fair publication of debate is privileged, and comments on legislative proceedings are not actionable, so long as a jury shall think them honest and made in a fair spirit, and such as are justified by the circumstances.[50]

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[44] Const. U. S., Amendt. II.

[45] 3 Tenn. 165 (1871); 31 Ark. 455 (1876); 35 Tex. 473 (1871).

[46] Whart. Dict.; 3 Johns. Cas. (N. Y.) 393, 394 (1804); 53 N. J. Law 27 (1890).

[47] Const. U. S., Amendt. I; Const. Pa., Art. I, Sec. 7.

[48] 3 Pick. (Mass.) 313 (1825).

[49] Cooley Const. Lim., p. 422.

[50] L. R. 4 Q. B. (Eng.) 73 (1868).

Fair comment and criticism is the right which every person has to freely and honestly comment and express opinions upon all public men and public affairs open to public discussion. So, also, with literature; liberty of criticism, so long as it is fair, reasonable, and just, and is not characterized by such a reckless disregard of fairness as to indicate malice toward the author, is allowed the utmost latitude.[51]

The distinction is broad between comment, or criticism, and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon, or criticize, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.[52]

The administration of justice is a subject for public comment, so long as the personal reputation of the person criticized is not assailed. Anything which assails the integrity or capacity of the judge of a court is a wrongful use of liberty of speech, or of the press, and, therefore, actionable.[53]

The evidence of a witness given upon oath in a court of justice is a matter of public interest and importance, and a legitimate subject for fair and *bona fide* comment. So, the decisions handed down by a court of justice may be fairly commented upon without rendering the person so commenting liable for defamation.[54]

24. The right to comment and criticize the public acts of public men is not the peculiar privilege of the press; it is the right of every individual, although exercised mostly by the press. A man who speaks in a newspaper has no greater right than he who speaks out of it. A newspaper is no sanctuary behind which a person can shield himself for breaking the law. The law is the same in regard to newspapers as to individuals; and, although it is the right and object of newspapers to publish all news concerning the public, yet, it is not permitted to make defamatory statements in doing so.

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[51] 122 Mass. 235 (1877); 4 F. & F. (Eng.) 1,107 (1866); 3 C. & P. (Eng.) 311 (1828).

[52] 11 App. Cas. (Eng.) 187 (1886).

[53] 25 Ky. 540 (1829).

[54] 2 Ir. R. C. L. 402 (1866).

A citizen has the right to speak the truth in reference to the acts governing public officers or individuals. The press is guaranteed the same right, but no greater right. The citizen has the right to criticize the acts of government, provided it be with the good motive of correcting what he believes to be existing evils and of bringing about a more honest administration of government. For like purpose and like motive, he may criticize the acts of public officials; and for the honest purpose of subserving the public interests, he may criticize the fitness and qualifications of candidates for office, not only in respect to their ability, fidelity, and experience, but in respect to their honesty and personal rights. The press has precisely the same rights, but no more. The citizen may, in what he honestly believes to be in the interest of morals and good order and the suppression of immorality and disorder, criticize the acts of other individuals; so may the press; but, in no case, has the citizen or the press the right to injure the rights of others, among the most sacred of which is the right to good name and fame. This negation extends to the denial of the right to speak, write, or print that which tends to injure the character or reputation of another, unless it be true in fact.[55]

25. Protection of People in Business. — Liberty of speech and of the press may not go to the extreme of defaming or prejudicing a person in his profession, trade, or business. Words spoken or written of merchants, tradesmen, and others, where credit is essential to successful prosecution, are actionable in themselves, without proof of special damage, if the words impute a want of credit or responsibility or suggest a charge of insolvency.[56]

The law has always been considerate of the reputation of tradesmen, and when one publishes of a tradesman or merchant any matter in relation to his calling, which, if true, would render him unworthy of patronage, it being evident that the tendency of such publication is to bring the subject

[55] Cooley Const. Lim. (6th Ed.) 518.

[56] 44 N. W. (Minn.) 311 (1890); 92 Tenn. 723 (1893).

thereof into disrepute and cause him injury, such publication would be libelous without proof of any special damage; and the law's restrictions extend, in its protection, to natural and artificial persons, and to all kinds of business.[57]

ILLUSTRATIONS.—It is defamatory and actionable to publish of a brewer that he is guilty of disgusting practices in preparing his malt;[58] to advertise that an optician is a "licensed hawker" and a "quack in spectacle secrets";[59] to publish of a person that he is a man of small business capacity;[60] to publish of an undertaker, that he charged the family of a deceased person an exorbitant sum for services, and that he was intoxicated when such services were rendered;[61] to charge a religious institution with teaching and permitting dancing in the school, and, hence, that its administration is harmful to the moral and religious interests of the community;[62] to publish of a railway company, that the ties in the roadbed are so rotten that travel over the same is dangerous to life and limb, or, that its engine and train crews are drunken or otherwise unfitted for their duties; to falsely state in a newspaper, that a business corporation is maintaining a precarious existence, and that it is not able to meet its financial obligations, and is tottering, bankrupt, and about to pass out of existence.[63]

26. Privileged Reports of Mercantile Agencies. A mercantile, or commercial, agency, is an institution that ascertains, registers, and makes known to parties (subscribers), having an interest, the financial standing, general business reputation, and credit ratings of individuals, firms, and corporations, engaged in mercantile and industrial pursuits. In England, these kinds of institutions are called *trade-protection societies.*

Such an agency is a lawful business, and, when conducted lawfully, is a benefit to society and trade, but no just reason can be given for a rule that would exempt it from liability for false and defamatory publications where other citizens would not be exempt.[64]

The reports of mercantile agencies are privileged communications, exempting them from liability for statements, otherwise libelous, when, and only when, such reports are

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[57] 2 Stra. (Eng.) 898 (1795); 50 N. Y. Supp. 161 (1898).
[58] 17 Wend. (N. Y.) 49 (1837).
[59] 1 F. & F. (Eng.) 559 (1859).
[60] 102 Ala. 458 (1894).
[61] 41 N. E. (N. Y.) 409 (1895).
[62] 28 S. W. (Mo.) 851 (1894); 85 Fed. Rep. 729 (1898).
[63] 82 N. W. (Neb.) 28 (1900).
[64] 72 Tex. 115 (1888).

made to subscribers having an interest which the law will recognize in the information given, and this interest must be more specific than that which subscribers have in all persons reported, and must be an interest in a particular concern or individual.[65]

27. In Canada, a stricter rule of liability is applied to mercantile agencies. A report is not privileged, although it be only communicated confidentially to a single subscriber to the agency on his application for information. To be privileged, the report must be based on the truth of the facts to which it relates.[66]

In England, by statute,[67] and in some of the United States, by similar statutes, no action can be maintained to charge any agency, or person connected therewith, for any representation made concerning the character, ability, or dealings in trade of any other person, unless the representation be in writing, signed by the parties sought to be charged.[68]

A mercantile agency usually contracts that *its agents* shall be considered *the agents of its patrons* (subscribers) and that it shall not be liable for the negligence of the agents. In an action upon such a contract, the latter will be enforced against a patron of the agency, who received incorrect information and sought to recover therefor. Having entered into the contract, though unwise, the patron must take the consequences.[69]

28. Where an agency contracts that the correctness of the information is in no manner guaranteed, the agency will not be liable for loss occasioned to a subscriber by the wilful and fraudulent act of a subagent in furnishing false information.[70]

Where, in an inquiry as to the standing of a certain grocer, report was made concerning another person of the same name, who was a grocer and a saloon keeper, the agency was not held liable, because such a mistake did not establish

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[65] Am. & Eng. Encyc. of Law (1st Ed.), Vol. 15, 281, citing 1 E. D. Smith (N. Y.) 279 (1851) and other cases.

[66] 3 Montr. Q. B. 83 (1887); 5 Montr. Q. B. 42 (1889).

[67] Act of 9 Geo. IV, Ch. 14.

[68] 12 Phila. (Pa.) 31 (1878).

[69] 7 W. N. C. (Pa.) 246 (1879); 6 Pa. Co. Ct. Rep. 360 (1889).

[70] 58 Fed. Rep. 174 (1893).

gross negligence on the part of the agency, the usual contract, stipulating that correctness of information is not guaranteed and limiting liability, having existed; but, such a contract will not protect the agency from an error made in the publication of its books of reference giving the financial responsibility of merchants, and upon which the subscribers rely in selling goods.[71]

An agency is not liable for defamation for publishing and circulating a daily report to subscribers of the execution of a chattel mortgage by a person;[72] nor for a report that a mortgage is foreclosed against a person.

29. Blacklisting is the publication of a list of delinquent debtors, bankrupts, and insolvents, and distributing them to subscribers. It is resorted to to coerce the payment of claims and sent out usually by associations calling themselves organizations for the collection of bad debts.[73]

To blacklist a person in writing, and thus publish of and concerning him that he is a delinquent debtor, when in fact he owes nothing, tends to injure his reputation, render him odious, and expose him to public contempt;[74] and publishing a man's name in a list of "dead beats and delinquents" for circulation among business men causes the same injury.[75] Such publications are defamations upon which actions may be brought against the offending parties; and, generally, the publication and issuing of a written communication which *blacklists* a person as a delinquent debtor of the writer, and which finds its way to the members of an association of which the writer is a member, is not a privileged communication, but is a libel and actionable.[76]

30. Privileged Communications.—A privileged communication is one made between such persons, or under such circumstances, that it involves no liability for defamation. Privileged communications are absolute or qualified. *Absolutely privileged communications* are fully

[71] 70 Hun (N. Y.) 334 (1893); 134 Pa. 161 (1890).
[72] 57 Md. 38 (1881).
[73] 77 Wis. 236 (1890).
[74] 20 S. E. (Ga.) 78 (1894).
[75] 25 S. W. (Tex.) 658 (1894).
[76] 77 Wis. 236 (1890); 93 Ga. 633 (1894); 175 Mass. 454 (1900).

protected by the law, and, as to such, no prosecution, civil or criminal, will lie, though averred to be malicious and false. *Qualified privileged communications* are those made *bona fide* but without express malice; a prosecution will lie against the person making such a communication, if it be false and made with express malice.

31. Absolutely privileged communications rest upon the doctrine of public policy, the interests and necessities of society requiring that the time and occasion of the publication or utterance, even though it be both false and malicious, shall protect the defamer from all liability to prosecution for the sake of the public good. It rests upon the same necessity that requires the individual to surrender his personal rights and to suffer loss for the benefit of the common welfare. This class is restricted to the narrow limits of judicial proceedings, parliamentary and legislative proceedings, and military and naval affairs.[77]

32. In England, in *judicial proceedings*, the statements of judges, counsel, suitors, witnesses, and jurors are absolutely privileged; such persons have absolute immunity from liability for defamatory words published in the course of judicial proceedings.[78]

In the United States, the same doctrine prevails, but it is insisted that the statements of counsel, suitors, and witnesses, in order to be privileged, shall be pertinent and material to the case.[79]

In the discharge of his professional duty, counsel may use strong epithets, however derogatory to other persons they may be, if pertinent to the cause, and stated in his instructions, whether the thing be true or false. But, if he maliciously travel out of his case for the purpose of slandering another, he would be liable to an action, and amenable to a just and often more efficacious punishment inflicted by public opinion.[80]

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[77] 11 Q. B. Div. (Eng.) 588 (1883); 64 Conn. 223 (1894).

[78] 4 H. & N. (Eng.) 569 (1859).

[79] 28 Iowa 51 (1869).

[80] 3 Chitty Pr. 887; 4 Wis. 358 (1867).

33. In the interests of the public, great freedom is allowed in complaints and accusations, however severe, if honestly made with a view of having them inquired into, to have offenses punished, grievances redressed, and the law carried into execution. Still, this privilege must be restrained by a limit, such as that a party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness, or third person, which have no relation to the cause or subject-matter of the inquiry.[81]

34. Not only the words uttered during the trial, but words used in an affidavit in the course of a legal proceeding, are absolutely privileged.[82] When words, otherwise actionable in themselves, are spoken by a witness in giving his testimony in a judicial proceeding, they are *prima facie* privileged, and it is with the party complaining of them to establish that they were not pertinent or material to the matter in controversy and that the speaker was actuated by malice. A witness is not bound to determine the materiality or pertinence of questions put to him, and, in the absence of objection or warning from the court or the counsel engaged in the cause, may make truthful and direct responses to such questions without being liable to an action.[83] But a remark, wholly irrelevant to the inquiry, made by a person in the witness box, which is not called out by any question and is maliciously used, will not be privileged, and may, also, be regarded as contempt of court.[84]

35. Where information is laid before a grand jury, or a competent judicial officer, charging another with a crime or misdemeanor, the communication is protected and the informer is free from liability;[85] but, if such informer reiterate his charge after the person informed against has been acquitted, he will be held responsible.

A juror, whether grand or petit, has absolute immunity as

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[81] 83 Fed. Rep. 803 (1897); 3 Metc. (Mass.) 193 (1841).
[82] 5 Ex. D. 53 (Eng.) (1879).
[83] 13 Wis. 193 (1860).
[84] 1 Harr. (Del.) 3 (1832).
[85] 6 Blackf. (Ind.) 255 (1842).

to anything he utters in the jury-room concerning a case, within the scope of his official duties.[86]

Statements made in the pleadings by parties, if applicable and pertinent to the subject of inquiry, are covered by the rule of absolute privilege; and, by the same rule, pertinent remarks, in open court, of a party conducting his own case, are privileged.[87]

36. In *legislative proceedings*, all statements made officially, pertaining to the proceedings, are absolutely privileged, as well as all written words and reports. Included are statements made in the legislative hall, committee room, or outside of both, if they concern the official business. These privileges are sacred, not to protect the members against prosecution, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecution, civil or criminal.[88]

37. A **qualified, or conditional, privileged communication** comprises statements made *bona fide* upon subject-matter in which the communicator has an interest, or in reference to which the communicator has an interest and duty to a person having a corresponding interest and duty. Such a communication is privileged although it contain defamatory matter, which, without this privilege, would be actionable.[89]

The occasions which give rise to the privilege of speaking or publishing words, which otherwise would be defamatory and actionable, are various. Thus, memorials to officers of state respecting the conduct of magistrates and officers; comments upon the character of candidates for office; communications in matters of public interest in which the general public is concerned; communications in the interests of third persons, or for the protection of the party's own interest; communications respecting the character of the servants or the credit and responsibility of tradesmen; or those made in

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[86] 42 Vt. 1 (1869).

[87] 2 Bur. (Eng.) 810 (1759); 72 Fed. Rep. 808 (1896); 13 Bush (Ky.) 480 (1877).

[88] 20 L. R. Ir. (Eng.) 600 (1887); 4 Mass. 1 (1808).

[89] 1 Camp. (Eng.) 269 (note) (1808); 71 Iowa 301 (1887); 79 Ill. App. 406 (1898); 9 Ont. (Can.) 593 (1885); 111 Pa. 404 (1886).

the performance of social, moral, or legal duties—all come within the class of qualified privileged communications.[90]

In these cases, the only effect of the change of the rule is to remove the usual presumption of malice. It then becomes incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or with the situation of the parties, adequate to authorize the conclusion. Proof of express malice so given will render the publication, petition, or proceeding, libelous. Falsehood and the absence of probable cause will amount to proof of malice.[91]

38. Where a confidential relation exists between two persons, such as husband and wife, father and son, master and servant, and principal and agent, either will be privileged in communicating to the other information for which he has not asked. So, also, a father, guardian, or an intimate friend, may warn a young man against associating with a particular individual.[92]

Though defamatory of a third person, information or direction given by the principal or employer to his agent or employe in good faith, and having relevance to the subject-matter of the agency, will be conditionally privileged.[93] And, upon like principle, the communication of an agent or servant to his principal or master, respecting the business of his employment, is privileged. Thus, where the cashier of a bank confides to a stockholder matter in reference to the solvency of one who was surety upon an official bond to the bank, the communication is privileged.[94]

The relation of physician and patient and those in attendance is of such confidential nature that statements made by a physician giving a warning against a druggist's incompetency, or against a butcher on the ground that he sold bad meat, are privileged.[95]

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[90] 49 N. J. Law 417 (1887).

[91] 3 How. (U. S.) 266 (1845).

[92] Odgers, Libel and Sland. (3d Eng. Ed.), pp. 234, 235.

[93] 10 C. B. (Eng.) 583 (1851); 100 N. C. 397 (1888); 89 Ga. 520 (1892).

[94] 53 N. J. Law 438 (1891).

[95] Am. & Eng. Encyc. of Law (2d Ed.), Vol. 18, p. 1,038, citing 2 F. & F. (Eng.) 590 (1861); 2 Marv. (Del.) 166 (1895).

39. **Slander of title to property** is an unfounded publication that a person has no title to either real or personal property of which he is the owner.[96] It may be committed orally, or in writing, or by printing, and must be made under such circumstances that the law will imply malice, or malice must be proved. Special damage must also be shown, such, for instance, that a bargain to sell land is lost. Unless the falsity of the words published, the malicious intent with which they were uttered, and a pecuniary loss or injury to the person owning the property be shown, the action cannot be maintained. If the alleged infirmity of the title exist, the action will not lie, however malicious the intent to injure may have been, because no one can be punished in damages for speaking the truth.[97]

CORPORATE TRUSTS AND LABOR COMBINATIONS

40. "There are many objects, of great value to man, which cannot be attained by unconnected individuals, but must be obtained, if obtained at all, by association."[98] Whatever the motive and purpose of formation, the law recognizes the right of persons to associate in business and in labor. There is scarcely an occupation or branch of trade, from the largest to the smallest, that does not feel the exciting and invigorating influence of the instrumentality of association.[99]

DEFINITIONS

41. An **association** is an organized union of persons for a common purpose; synonymous with the term are companionship, fellowship, friendship, and society.

42. A **corporate trust** is a combination of individuals, partnership firms, or corporations, to control their several

[96] 60 Cal. 160 (1882); 108 N. Y. 445 (1888).
[97] 27 S. E. (N. C.) 109 (1897).
[98] Daniel Webster's speech (Pittsburg, Pa., July, 1833).
[99] 5 Fla. 510 (1854).

pursuits under one direction. It is essentially an agreement among producers and venders of certain commodities for their mutual protection and profit.[100]

The common device employed to form a corporate trust out of a number of corporations is the transfer of the stock of the several corporations to a central committee, or board of trustees, who issue in return certificates to the stockholders of all, entitling the holders to dividends or to a share in the profits of the combined business, the object being to enable the trustees to elect directors in all the concerns, to control and suspend at pleasure the work of any, and, thus, to economize expenses, regulate production, and destroy competition, or at least to control the latter.

43. A **trades-union** is a confederation of workmen of the same trade, or of allied trades, for the purpose of securing, by united action, mutual support, and protection, improvement of their industrial conditions, especially in the regulation of wages and hours of labor. Trades-unions, usually, achieve their object by means of strikes, and incident to strikes are boycotts and picketing. Combinations of employers resort for their protection to lock-outs and blacklists; trades-unions, also, frequently resort to blacklists.

44. A **strike** is a preconcerted quitting of work by workmen in order to compel an employer to accede to some demand; as an increase of wages, a change in the hours of labor, or in the mode of conducting the business, or to enforce some particular policy in the character or number of the men employed.[101]

45. A **boycott,*** in the popular acceptation of the term, is an organized effort to exclude a person from business

[100] The Forum, Vol. 8, p. 61.

[101] 58 N. Y. 573 (1874).

**Origin of Boycott.*—An idea of the real meaning of the word *boycott* may be gathered from the circumstances in which it originated, as narrated by Mr. Justin McCarthy. In his work entitled "England Under Gladstone," he says: "The strike was supported by a form of action, or rather inaction, which soon became historical.

relations with others by persuasion, intimidation, and other acts which tend to violence, and thereby coerce him, through fear of resulting injury, to submit to dictation in the management of his affairs.[102]

46. A **lockout** is a refusal on the part of an employer to furnish work to his employes in a body, intended as a means of coercion. A lockout of employes by employers is permitted by the law as part of the right of employers to conduct their business in their own way; however, if employes be working under contract and by a lockout the contractual relations will be violated, the lockout is illegal.[103]

47. A **blacklist,** in this connection, is a list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list, or those among whom it is intended to circulate; as, where a trades-union blacklists workmen who refuse to conform to its rules, or an employer blacklists employes who have been discharged for neglect of duty or for other reasons.[104]

48. A **conspiracy** is an agreement or combination between two or more persons to do an unlawful act, or to

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Captain Boycott was an Englishman, an agent of Lord Earne, and a farmer of Lough Mark, in the wild and beautiful district of Connomara. In his capacity as agent he had served notices upon Lord Earne's tenants, and the tenantry suddenly retaliated in a most unexpected way by, in the language of schools and society, sending Captain Boycott to Coventry in a very thorough manner. The population of the region for miles around resolved not to have anything to do with him, and as far as they could prevent it, not to allow any one else to have anything to do with him. His life appeared to be in danger—he had to claim police protection. His servants fled from him as servants flee from their masters in some plague-stricken Italian city. The awful sentence of excommunication could hardly have rendered him more helplessly alone for a time. No one would work for him, no one would supply him with food. He and his wife had to work in their own fields themselves, in most unpleasant imitation of Theocritan shepherds and shepherdesses, and play out their grim eclogue in their deserted fields with the shadows of the armed constabulary ever at their heels. The Orangemen of the north heard of Captain Boycott and his sufferings, and the way in which he was holding his ground, and they organized assistance and sent him down armed laborers from Ulster. To prevent civil war the authorities had to send a force of soldiers and police to Lough Mark, and Captain Boycott's harvests were brought in and his potatoes dug by the armed Ulster laborers, guarded always by the little army." 55 Conn. 76, 77 (1887).

[102] 3 Railw. Corp. Law J. 561 (1888).

[103] 77 Hun (N. Y.) 215 (1894).

[104] Black's Law Dict.

accomplish a purpose, lawful in itself, by means that are criminal or unlawful.[105]

49. Picketing is the act of trades-unionists in sending men to watch and annoy men in a mill or shop not working under the union; or the act of strikers in stationing some of their number at the premises to watch and annoy men who have taken their places, or to intimidate persons who desire to engage to work in their places.

LEGALITY OF TRUSTS

50. A **trust,** as an incorporated association, having legislative permission to operate, and managing and controlling its affairs by its directors, is legal; but, by the federal antitrust act, every contract or combination, in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, also, every attempt to monopolize any part of such trade or commerce, is illegal.[106]

51. A **monopoly** is the exclusive right, power, or privilege of engaging in a particular traffic or business, or the resulting absolute possession or control; any combination among merchants to raise the price of merchandise, to the detriment of the public. By the constitution of some states, it is declared that monopolies "are contrary to the genius of a free government, and ought not to be allowed."[107]

It is clearly intended by the federal antitrust act, before mentioned, to declare monopolies by combinations illegal. To constitute the offense of monopolizing or attempting to monopolize under that act, it is necessary to acquire, or attempt to acquire, an exclusive right in such commerce by such means as are adequate to prevent others from engaging therein.[108]

A monopoly exists where all, or nearly all, of an article of trade or commerce within a community or district is

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[105] 1 Wheel. Cr. Cas. (N. Y.) 142 (1823).
[106] 26 U. S. Stat. (1890), c. 647, p. 209.
[107] Consts. Md., N. C., and Tenn.
[108] 52 Fed. Rep. 104 (1892).

brought within the hands of one man or set of men, as to practically bring the handling or production of the commodity or thing within such single control to the exclusion of competition or free traffic therein.[109] An agreement, the purpose or effect of which is to create a monopoly, is unlawful, if it relate to some staple commodity or thing of general requirement and use, or of necessity, and not something of mere luxury or convenience.

Combinations between individuals or firms for the regulation of prices and of competition in business are not monopolies, and are not unlawful as in restraint of trade, so long as they are reasonable and do not include all of a commodity or trade, or create such restrictions as materially affect the freedom of commerce.[110]

52. In some states, statutes, which differ in some respects in language, declare it unlawful for any person, partnership, company, association, or corporation to enter into any contract or combination whereby a common price shall be fixed for any article or product, or whereby the manufacture or sale thereof shall be limited or interferred with, or whereby the profits of the manufacture or sale of any product shall be made a common fund to be divided among the parties to the combination.[111]

In some states, by statute, it is unlawful for any stock corporation to combine with any other corporation for the prevention of competition.[112] In deciding whether a business combination is or is not lawful, the test is whether, in conducting its business, it is doing so in lawful competition with others or not. Competition, in itself, is lawful, and no matter how sharp it may be or what injury may result from it, a person has no remedy; for, otherwise, the very life of trade would be killed. But, as in other branches of law, a person cannot use *lawful means* to do an *unlawful act*, so, if a person without a lawful intent injure the business of

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109 115 Cal. 16 (1896).
110 *Ibid.*
111 Neb. Sess. Laws (1889), p. 516; Ill. Sess. Laws (1891) 206; Iowa Acts (1890), c. 28, p. 41, and other states.
112 N. Y. Stat. (1890), p. 1,069.

another by means of competition in business, the person injured has a legal remedy.

53. A trader may lawfully engage in the sharpest competition with those in a like business by holding out extraordinary inducements, by representing his own wares to be better and cheaper than those of others, yet, when he oversteps that line and commits an act with the malicious intent of inflicting injury upon his rival's business, his conduct is illegal, and, if damage result from it, the injured party is entitled to redress.[113]

Persons engaged in any trade or business may, to such limited extent as may be fairly necessary to protect their interests, enter into agreements which will result in diminishing competition, thus increasing prices. Just the extent to which this may be done courts have been careful not to define, just as they have refused to set monuments along the line between fairness and fraud; but the presumption is always against the validity of such agreements.[114]

A combination to fix prices and to diminish competition is not unlawful, if its purpose be to fix reasonable prices and not to entirely stifle competition. It is permitted that business combinations may organize to prevent undue competition, and, to a certain extent, to prevent due competition, but it is not permitted to such organizations to conduct their business in such a manner as to entirely prevent *general* competition; the courts draw a line as to how far a combination may go in order to suppress competition, and to what extent they may suppress it, different cases having drawn the line at different places, but, in no case, have they permitted a combination to suppress and stifle any and all competition.

54. Lawful combinations in trade are not condemned, and self-preservation may justify the prevention of undue and ruinous competition, by combination, when the prevention is sought by fair and legal methods.[115] It is legitimate to

[113] 56 N. J. Law 323 (1893).
[114] 23 Am. Law. Reg. N. S. 648.
[115] 148 N. Y. 58 (1895).

combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade; but, if the motives of a combination be to oppress, the means they use unlawful, or the consequences to others injurious, their confederation will become a conspiracy.[116]

The question whether a business combination is unlawful or not, is, also, tested by the contracts into which it enters.[117] If it enter into contracts which are in restraint of trade and endeavor to enforce them, and the court so finds, it will declare the contracts void and the combination will be enjoined from carrying on its business.

An agreement in general restraint of trade is contrary to public policy, illegal, and void; but, an agreement in partial or particular restraint upon trade has been held good, where the restraint was only partial, consideration adequate, and the restriction reasonable.[118]

55. Blacklisting.—As part of an employer's right to conduct his business, he may discharge any one from his service, unless to do so would be in violation of the contractual relations with the employe; but, the right to discharge does not imply a right to be guilty of a violent or malicious act which may result in the injury of a discharged employe. Therefore, an employer, such as a railway company, may keep a record of the causes for which the employes are discharged, but, the statements in the record must be truthful.

In some states, by statute, blacklisting discharged employes by a corporation, or by a combination of employers, to prevent any discharged employes from obtaining employment, or otherwise to attempt to prevent such employes from obtaining employment, is declared to be a misdemeanor.[119] In other states, the publication and circulation among its officers and employes of a list of discharged employes who are considered incompetent and untrustworthy, is not

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[116] 23 L. R. Q. B. Div. 598 (1889); 68 Pa. 173 (1871).

[117] See *The Law of Contracts.*

[118] 79 Ill. 346 (1875).

[119] Mont. Laws (1891), p. 257; Ga. Acts (1890-1), p. 183.

libelous, unless malicious and false, and a person who is on the list has no action, unless he can show that the publication is malicious and known to be false.[120]

LABOR COMBINATIONS

56. In the United States, there has never been any question of the legal right of workmen in any trade to combine for the purpose of controlling their own members in their actions, and to impose penalties upon them alone. Whether denominated trades-unions, labor-unions, knights of labor, united workers, amalgamated associations, or what not, the right of persons to associate in labor is recognized by the law. In some states, it is a misdemeanor to discharge workmen merely because of their membership in such bodies, or to exact pledges from them that they will not join.[121] The constitutionality of such legislation has, however, in some jurisdictions, been seriously questioned.[122] Such trades-unions are, usually, empowered by the statute to adopt special trade marks to distinguish the product of the labor of their members, with leave to register such trade marks in the office of the secretary of state, and imposing a penalty for the counterfeiting of the same.[123]

57. In England, before the year 1824, the industrial legislation of the country leaned decidedly in favor of the masters. To exercise a trade in any town without having previously served an apprenticeship of seven years was a penal offense. To entice artisans to settle abroad was, also, punishable criminally, and all artificers refusing to return to England within six months, after warning given by the British ambassador, were deemed aliens and forfeited their lands and goods.[124] It was a criminal offense, punishable by three months' imprisonment, for any persons, other than a single journeyman and his

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120 73 Tex. 568 (1889).
121 Stats. of Ind. (1893), Ill. (1893), N. J. (1894).
122 31 S. W. (Mo.) 781 (1895).
123 Stats. of N. H. (1895), Pa. (1895), Mass. (1895).
124 4 Black. Comm. 160.

master, to enter into a contract for shortening the hours of labor, or for obtaining an increase of wages.[125]

By a statute passed in 1824, the former acts relating to combinations of masters as to wages, time of working, quantity of work, etc., were repealed, and subsequent statutes have made it a criminal offense for masters to force their workmen to belong to clubs, or to prevent them from hiring themselves out. The laws preventing artificers from going abroad have also been repealed.[126]

LAWFUL PURPOSES OF LABOR-UNIONS

58. Associations with the avowed object of protecting the rights of workmen exist in most all civilized countries, especially in England, Canada, and the United States, where legislation with respect thereto and judicial interpretation of whose purposes have been the subject of much concern. Statutes in nearly all of the United States expressly provide for the formation of trades-unions, and there is scarcely a judicial tribunal, federal or state, that has not been called upon to wrestle with questions which have been raised by the operation of these associations.

Of primary importance is the judicial declaration that the organization or the cooperation of workmen is not against any public policy. It has the sanction of law, when it is for such legitimate purposes as that of obtaining an advance in the rate of wages or of maintaining the rate. To combine for lawful purposes is proper and praiseworthy, and, perhaps, falls within that general view of human society which perceives an underlying law that men should unite to achieve that which each by himself cannot achieve, or can achieve less readily.[127]

59. All men are freemen, and, so long as they do not interfere with the rights of others, they may do with their own whatever they please. "In the highest sense, a man's arm is his own, and, aside from contract relations, no one

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125 Stimson, Handbook of Labor Laws, p. 173.

126 4 Black. Comm. 160, 161, and notes.

127 152 N. Y. 33 (1897).

but he can direct when it shall be raised to work, or shall be dropped to rest. The individual option to work or to quit is the imperishable right of a freeman. But the raising and dropping of the arm is the result of a will that resides in the brain, and, much as it may be desired that such wills should remain independent, there is no mandate of law which prevents their association with others, and response to a higher will."[128]

Every man has a right to determine what branch of business he will pursue and to make his own contracts with whom he pleases and on the best terms he can. He may change from one occupation to another, and pursue as many different occupations as he pleases, and competition in business is lawful. He may refuse to deal with any man or class of men. And it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price, or without certain conditions.[129] The legality of such association will depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair or honorable and lawful means, it is innocent; if by falsehood or force, it may be stamped with the character of conspiracy.[130]

Moreover, every man has a right, under the law, as between himself and others, to full freedom in disposing of his own labor or capital according to his own will, and any one who invades that right without lawful cause or justification commits a legal wrong, and, if followed by an injury caused in consequence thereof, the one whose right is thus invaded has a legal ground of action for such wrong.[131] But, freedom does not imply a right in one person, either alone or in combination with others, to disturb or annoy another, either directly or indirectly, in his lawful business or occupation, or to threaten him with annoyance or injury to compel him to do any act against his will.[132]

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128 62 Fed. Rep. 828 (1894), p. 831.
129 106 Mass. 14 (1870); 75 Me. 225 (1883).
130 4 Metc. (Mass.) 111 (1842), p. 134.
131 176 Ill. 608 (1898), p. 615.
132 106 Mass. 15 (1870).

60. Within reasonable limits, labor associations are not only lawful, but are beneficial when they do not restrain individual liberty and are under enlightened and conscientious leadership. Employes have a right to organize into, or to join, a labor-union which shall take joint action as to their terms of employment. It is of benefit to them and to the public that laborers should unite in their common interest and for lawful purposes. They have labor to sell, and, if they stand together, they are often able, as an association, to command better prices for their labor than when dealing singly with rich employers, because the necessity of the single employe may compel him to accept any terms offered him. The accumulation of a fund for the support of those who feel that the wages offered are below market price is one of the legitimate objects of such organization. They have, as well, the right to appoint officers who shall advise them as to the course to be taken in their relations with their employer. They may unite with other unions. The officers they appoint, or any other person to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or if they choose to repose such authority in any one, may order them, on pain of expulsion from their union, *peaceably* to leave the employ of their employer, if any of the terms of their employment are unsatisfactory.[133]

UNLAWFUL ACTS OF LABOR-UNIONS

61. Labor societies, lawful and laudable as they may be in the organizations, have no particular legal status or authority. They stand before men and the law like other social organizations, and, in the commission of unlawful acts, the members may be held amenable to the law.[134] It is criminal to organize for the invasion of the rights of others; and, if one workman, or set of workmen, attempt by force, threats, or intimidation, to coerce another man, or set of men, in the fair exercise of the rights they hold to fix their

[133] 62 Fed. Rep. 803 (1894), p. 817.

[134] 27 Fed. Rep. 445 (1886).

own price for that labor which is every man's own, it is oppression, and any combination for such purpose is a conspiracy.[135]

Any number of workmen may agree among themselves that they will not work below certain rates, but they have no right to compel, against their will, other men from accepting employment at rates which are satisfactory to them. An organization of workmen is in line with good government when it is intended as a legitimate instrumentality to promote the common good of its members. If it militate against the general public interest, if its powers be directed toward the repression of individual freedom, then, it is unlawful.[136]

62. The social principle which justifies labor organizations is departed from when they are so extended in their operation as to injure others. Public policy and the interest of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workmen be to hamper or to restrict that freedom, and, through contracts or arrangements with employers, to coerce other workmen to become members of a union, under the penalty of the loss of their employment, the purpose is an unlawful one and conflicts with that principle of public policy which prohibits monopolies.[137]

A boycott is not unlawful, unless attended with some act, in itself, illegal.[138] But persons have no right to institute an unlawful boycott, whether they be employes doing so in order to destroy their employer's business, or whether the boycott is by tradesmen against a particular dealer. A combination in the nature of a boycott is unlawful that causes a loss to one person by coercing others, against their will, to withdraw from him their beneficial intercourse, through threats that, unless those others do so, they will cause similar loss to them;[139] or that obstructs an employer in the

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135 2 Daly (N. Y.) 1 (1867).
136 152 N. Y. 33 (1897).
137 *Ibid.*
138 54 Minn. 223 (1893).
139 15 Q. B. Div. (Eng.) 476 (1885).

conduct of his business;[140] or a combination of two or more persons to constrain an employer to discharge a particular workman, by threatening to prevent his obtaining other workmen; or to constrain a workman to join a certain organization, by threatening to prevent him from obtaining work, unless he does so.[141]

LEGALITY OF STRIKES

63. The legality or illegality of a strike depends on the means by which it is enforced, and on its objects. It may be *criminal*, as if it be a part of a combination for the purpose of injuring or molesting either master or men; or it may be simply *illegal*, as if it be the result of an agreement depriving those engaged in it of their liberty of action; or it may be perfectly *innocent* and *legal*, as if it be the result of the voluntary combination of men for the purpose only of benefiting themselves by raising their wages, or for the purpose of compelling the fulfilment of an engagement entered into between employers and employes, or for any other lawful purpose.[142]

64. To carry out the method of protection and welfare for which it is lawful for workmen to combine, they may quit work altogether by a preconcerted movement, more commonly called a strike. Unless they be under contract, employes may quit work at pleasure. When workmen have the right to strike, that is, when they are not under contract, the fact that they simultaneously avail themselves of the right does not render the act of quitting work criminal.[143] And the members of a trades-union may, by peaceable persuasion, induce the employes of another to quit work and go on a strike, provided the persuasion be not for an unlawful purpose;[144] but, if the men who are thus appealed to be working under contract and their employer be damaged by the strike, he will be entitled to a legal remedy,

140 147 Mass. 212 (1888); 64 Mich. 252 (1887).
141 67 Vt. 690 (1894).
142 L. R. 4 Q. B. (Eng.) 602, 612 (1869).
143 63 Fed. Rep. 310 (1894).
144 23 Fed. Rep. 748 (1885).

although only peaceable persuasion was used to induce his men to quit work.[145]

It is claimed that these principles should not be applied in the case of employes of a railroad company, which, under legislative sanction, constructs and maintains a public highway primarily for the convenience of the people, and in the regular operation of which the public is vitally interested. In the absence of legislation to the contrary, the right of one in the service of a public corporation to withdraw therefrom at such time as he sees fit, and the right of the managers of such a corporation to discharge an employe from service whenever they see fit, must be deemed so far absolute that no court will compel him, against his will, to remain in such service, or actually to perform the personal acts required in such employment, or compel such managers, against their will, to keep a particular employe in their service.[146] But, a strike by a combination of railroad employes, is, in itself, unlawful, if the concerted action be knowingly and wilfully directed by the parties to it for the purpose of obstructing and retarding the passage of the mails, or in restraint of trade and commerce among the states.[147]

65. However, the laws for the protection of trade have, in recent years, been materially modified by the admission of exceptions, as industrial progress has rendered specific applications of the principles no longer necessary. The most notable exception, perhaps, is that in favor of labor combinations. This is due, in England and Canada, to the passage of express statutes; but, in the United States, the admission of the exception is largely due to the action of the courts themselves.[148]

In England, it is declared by statute, that an agreement or combination of two or more persons to do or procure to be done any act in contemplation or furtherance of a trade

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145 21 Cin. Law Bul. 223.

146 63 Fed. Rep. 310 (1894).

147 67 Fed. Rep. 698 (1895); 63 Fed. Rep. 436 (1894).

148 Am. & Eng. Encyc. of Law (2d Ed.), Vol. 18, p. 83, citing Eng. Crim. Law Amendment Act (1871) (34 and 35 Vict., c. 32); the Canada Trades Union Act (35 Vict., c. 30).

dispute, between employers and workmen, shall not be indictable as a conspiracy, if such act committed by one person would not be indictable as a crime.[149]

ARBITRATION

66. In some of the United States, statutes provide for *boards of arbitration* for the adjustment of trade disputes between employers and their workmen.[150] A federal statute, passed in 1888, makes similar provisions for disputes between railroad companies and their employes. It was by virtue of this statute that the president, in 1894, appointed a commission to investigate the Chicago riots.

In England, in 1867, an act was passed establishing "equitable councils of conciliation," for the settlement of wage disputes and the adjustment of kindred labor controversies. In 1872, further and more extensive provision was made for the introduction of the principle of arbitration.[151]

COLLECTION OF DEBTS BY CRIMINAL PROCESS

67. No man can lawfully invoke the aid of the criminal process of the law to have decided a question of property, or the question affecting the indebtedness due from one individual to another, or other civil rights.[152]

Debts are contracts, rights existing between individuals which do not pertain to, or affect, the community generally. Legal actions for contracts, and for all rights between individuals, are exercised and enforced in the civil courts only; a criminal court, which is a tribunal for the trial of criminal cases--offenses against the community, affecting all the people in the community—is not the proper jurisdiction in which to bring an action affecting only the parties in interest.

149 Conspiracy and Protection of Property Act (1875) (38 and 39 Vict., c. 86) (1891); 2 Q. B. 549, note 557.

150 Stats. of Mass. (1890), Ohio (1893), N. J. (1892).

151 Schouler, Dom. Rel., Sec. 456, citing 30 and 31 Vict., c. 105 (1867); 35 and 36 Vict. (1872).

152 49 Tex. 131 (1878); 86 Tex. 497 (1894).

Where a person endeavors or attempts by a criminal process to collect a debt, he is liable to the person he has had arrested in an action for *malicious prosecution;*[153] for any motive, other than that of simply instituting a prosecution for the purpose of bringing a person to justice, is a malicious motive on the part of the person who acts in that way.[154]

MALICIOUS PROSECUTION

68. A wanton prosecution made by a prosecutor in a criminal proceeding, or by a plaintiff in a civil suit, without probable cause, by a regular process and proceeding, which the facts did not warrant, as appears by the result, is a **malicious prosecution.**[155]

An arrest by a legal warrant on a criminal charge to compel the satisfaction of a mere private civil demand is a misuse of process, a fraud upon the law, and an illegal arrest as respects the party who knowingly and purposely perverts the machinery of the law in that way.[156]

If, as a matter of fact, a criminal prosecution be instituted for some collateral purpose, and, as a means of coercing another to surrender some right or claim which he makes regardless of the vindication of the law, whether or not the person against whom it is commenced has committed a criminal offense, the prosecution so begun is without probable cause and is a malicious prosecution.[157]

69. If a criminal prosecution be instituted against a person for the mere purpose of coercing him into payment of a debt, or the surrender of some right claimed, and not in the interest of public justice, or to vindicate the law and punish crime, the charge is falsely made. The fact that he procured the advice of counsel will not shield the party making the charge from the consequences of his wrongful act, done, not in good faith upon such advice, but with the sinister motive

153 10 Ex. (Eng.) 352 (1854).
154 13 Neb. 492 (1882).
155 Bouv. Law Dict.
156 26 Mich. 518 (1873).
157 77 Ill. 603 (1875); 116 Ind. 146 (1888).

of personal gain. But, where competent counsel is consulted, to whom the facts are fully explained by the party, who then acts in good faith and in honest belief that the party charged is, probably, guilty of the criminal offense, this advice of counsel will constitute a defense in an action for malicious prosecution, for the reason that it is assumed that the advice of counsel creates that probable cause without which the institution of a criminal prosecution against another cannot be tolerated. If counsel be sought simply for protection against indulging one's malice, or to enable him to use the criminal laws for unjust and oppressive uses for his private gain and advantage, it will afford no defense to the party causing the arrest, but will be rather an element of increased damages.[158]

158 144 Ill. 83, 88 (1893), quoting from 69 Ill. 376 (1873) and 26 Ill. 259 (1861).

THE LAW OF PROPERTY

(PART 1)

PROPERTY IN GENERAL—REAL AND PERSONAL

1. "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[1]

So great is the regard of the law for private property, that it will not authorize the least violation of it, not even for the general good of the community. The property of a person may be taken for public use, but not without just recompense; and no man or set of men may lawfully make use of, or interfere with, the property of another without his permission.[2]

2. The **right of private property**—the third of the absolute rights inherent in every person, the other two having been hereinbefore treated—consists in the free use, enjoyment, and disposal of all one's acquisitions, without any control or diminution, save only by the laws of the land.[3]

3. Property, in its strict sense, is the right which a person has to possess, use, enjoy, and dispose of anything that can be the subject of ownership to the exclusion of all other persons. In the sense that it includes everything in

[1] 2 Black. Comm. 2.
[2] 3 Vr. (32 N. J.) 554 (1867).
[3] 1 Black. Comm. 138.

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which there can be an ownership, the term *property* is often applied to the object in which a right of property exists.[4]

4. The ancient division of property was not into things real and things personal, but into things *movable* and things *immovable*. When an article of movable property was stolen or in any manner taken from its owner, he could go to a court of law and demand the restoration of his property. But the restoration of the property often proved difficult, or even impossible, for, the property being movable, it was capable of being destroyed or hidden or made away with in various ways. Consequently, the court more frequently awarded the owner a sum of money as damages than it restored the actual property lost. The suit was brought against the person who had in any manner obtained possession of the property; for that reason it was called a *personal action*, and the thing lost, *personal property*.

On the other hand, if a man were deprived of his *immovable* property, of which *land* is a type, it was always possible to recover the *identical*, or the *real*, *thing* lost, since it could not be moved away. Since the *real thing* lost could be recovered, the action, or suit, brought for this purpose was called a *real action*, and it was because real actions were remedies for the recovery of lands that land became classed as a real thing; and because of its permanent nature, the terms *real property*, *real estate*, and *realty* are interchangeably used to denote land.[5]

5. Personal Property.—Personal property is the right or interest which a man has in things personal.[6] The term *personal property* is applied to all those objects and rights over which ownership may be exercised that do not concern land, and also all interests in land that are of certain and fixed duration. These objects and rights, like the corresponding objects and rights of real property, are of two kinds, *corporeal* and *incorporeal*.

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[4] 102 Ill. 64–77 (1882); 109 Ind. 47–58 (1886).
[5] Mitchell, Real Est. and Conv., pp. 1–3.
[6] Bouv. Law Dict., Vol. 2, p. 409.

6. **Corporeal personal property** is such as has an actual material existence, and may be seen and handled; for example, a book, a horse, or a vehicle. These are called *choses in possession*, from the old French law term *chose*, which, in modern French, means a *thing*, and are more properly termed *chattels*, though the latter term is frequently used to designate all property which is not real. The term *corporeal things* is also used to denote this kind of personal property.

7. **Incorporeal personal property** includes all the rights which grow out of tangible personal property which is not in the possession of its owner. They are of two classes. Rights of the first class are usually called *choses in action*, and include those rights which flow from the infinite variety of contracts, covenants, and promises which confer on one party a right to recover a personal chattel or a sum of money from another, by action. Rights of the second class include the even greater variety of rights to recover damages for wrongs of all sorts, as for example, a right to recover for personal injuries, and to set aside a fraudulent conveyance. These are usually designated as personal rights, or *rights of action*, claims, or demands, and are hereinafter classified and explained.[7]

8. **Chattels real** are all interests in land, the duration of which is fixed and certain. Thus, a lease of land for ninety-nine years is personal property because the exact time at which it will terminate is known. Originally, a tenant for a specified term of years, if turned out of his property by a third party, had no right to recover the land from the ejector, his only redress being a personal action against his landlord for breach of his agreement for quiet possession. Subsequently, the tenant was given the right to recover the land, but a term for years is still considered personal property. Chattels real, although termed *chattels*, are properly classed with incorporeal personal property.

[7] 8 How.(U. S.) 449 (1850); see Personal Property, Incorporeal Personal Property, *infra*.

REAL PROPERTY

9. **Real property,** real estate, or realty, consists of lands, tenements, or hereditaments. **Tenement** signifies anything that may be holden. The term is derived from the feudal system and comprises not only substantial things, such as houses, but also things of an unsubstantial kind, offices, rents, and the like, provided they be of a permanent nature.

10. **A hereditament** is anything heritable; anything that descends on the death of the owner to his heir. Both lands and tenements are included in the term *hereditaments*. Tenements may or may not be land, but all lands and tenements are hereditaments. Hereditaments are either corporeal or incorporeal. *Corporeal* are such as exist in a material form; *incorporeal*, such as do not have a material existence. They are treated more specifically elsewhere in the present subject.

11. **Lands.**—The term **land** includes the surface of the earth, with all above and beneath it. It is classified as *land natural*, *land by accession*, and *land by construction of law*. When one is the absolute owner of land, he owns everything from the center of the earth to the highest heavens, the earth, stones, and minerals in one direction, and the herbage, trees, and space unoccupied in the other direction.[8] The ownership of land primarily includes that of the minerals underlying it. The land and the minerals may, however, belong to different owners. The same rule applies to the ownership of oil or gas.

12. **Water** is a species of real property. The owner of land is not the proprietor of the water which runs through it; he has a property in the land over which the water passes, but his right to the water is only to use it for the gratification of his ordinary wants. The owner of the land below him, through or by which the water takes its accustomed and natural course, has the same right to the water as the upper proprietor has, and the rights of all the riparian proprietors

[8] Mitchell, Real Est. and Conv., p. 14.

upon any stream are, in the eye of the law, equal with respect to the water.[9]

13. Land by Accession.—Things which are fixed or firmly attached to the soil, houses and other buildings, fences, and trees, are comprised in **land by accession.** By a rule of the common law, anything that is fastened to the soil belongs to and is part of the land or realty. On the other hand, things which are capable of being moved and taken away are personal property or chattels. Building material, such as lumber or stone, lying loose on the soil, are personalty, but they become realty, or part of the land, when erected into a building. So, if a tree, which is realty, or part of the land, while growing on, or attached to, the soil, be cut down and sawed or cut into lumber, its character changes from realty (land) into personalty (chattels or personal property).[10]

14. Fixtures.—The term **fixtures** is applied to things comprised in land by accession when they come within the description of things affixed to the soil; but the term has a twofold meaning. Sometimes it is applied to an article which, though originally personal property, has become realty by being physically affixed to the latter. At another time it is used to denote an article which, though physically joined to realty, may be removed from it at the will of the person who affixed it. The former sense is the one in which the term is generally used.[11]

15. In determining whether an article is a fixture or not, the following circumstances should be considered: (1) Is there actual annexation to the realty or something appurtenant to it? (2) Is the article appropriate to the use or purpose of that part of the realty with which it is connected? (3) What was the intention of the party making the annexation? Did he propose to make the article a permanent accession to the freehold? This intention is inferred from the nature of the article affixed, the relation and situation of the party making

[9] Mitchell, Real Est. and Conv., p. 15.
[10] *Ibid.*, p. 17.
[11] 1 Ohio 511 (1853); 30 Pa. 185 (1858).

the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.

16. Originally, an article was not a fixture unless it were physically joined to the ground by removing the soil or making it fast to something already in the ground.[12] The rule now is, that if the article be indispensable in carrying out a specific business, it is realty, whether joined to the land or not; and this is so whether the article be kept in place by its own weight, or be slightly attached to the realty for the purpose of steadying it.[13]

When a building is erected for a particular purpose and machinery is placed therein to carry out that purpose, and is reasonably necessary therefor and so placed as to give the idea of permanency, it will be considered a fixture, irrespective of its weight and size.[14]

Where the principal part of machinery is actually fastened to the realty, such part of it as is not physically annexed, but which if removed would leave the principal thing unfit for use, and could not, by itself, be used elsewhere, is considered part of the realty. Accordingly, capping machines and a work-table, not actually annexed, but essentially necessary to the working of the principal machinery, are fixtures.[15]

17. Trade, agricultural, domestic, or ornamental fixtures are articles which, though originally personal property, yet when affixed by a tenant to the realty, cease to be personalty by becoming part of the realty. It is in the power of the tenant to reduce them to the state of personal property again by severing them during his tenancy, but until they are severed they are a part of the realty.[16]

Trade fixtures are articles which the tenant has affixed to the realty for the purpose of carrying on his business; such as an office counter, an iron safe, platform scales, a building to cover machinery, and pans, furnaces, boilers in a factory.[17]

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[12] 3 De G. F. & J. (Eng.) 381 (1862).
[13] 2 Kay & John. (Eng.) 536 (1856); 88 Pa. 368 (1879); 2 Flipp. (U. S.) 599 (1880).
[14] 42 N. J. Eq. 218, 225 (1886).
[15] 67 Md. 44 (1887).
[16] 2 Sm. L. C. 223; 7 Taunton (Eng.) 188 (1816).
[17] 2 Colo. 273 (1874); 4 Lea (Tenn.) 329 (1880); 147 Mass. 479 (1888).

Agricultural fixtures are articles erected by a person engaged in cultivating the soil and its produce. The same rules apply to them as to trade fixtures. Thus, a tenant on a cotton plantation is entitled to remove a cotton gin which he brought upon the land.[18]

Ornamental, or *domestic, fixtures* are articles annexed to the realty by the tenant for his convenience. Chimney-pieces, cisterns, gas fixtures, chandeliers, hanging pipes for gas or water, pumps, stoves, ranges, ovens, and boilers are examples of fixtures of this class.[19]

18. Growing Crops.—Another species of property which may undergo a change of character is **growing crops.** They partake of the nature of the land and pass by a conveyance of it, in the absence of a contrary reservation. They are the personal estate of him who planted them, and in case of his death go to his personal representatives and not to his heir; if the land be devised by will the crops are included, unless the will provide to the contrary.[20]

Growing crops are of two kinds, those of natural growth, and those which require the expenditure of money and labor in their production, such as corn, wheat, oats, and cotton. Natural products are regarded as part of the land and therefore realty; the cultivated products are personal property. Grass is regarded as a natural growth and so are hops and unpicked berries.[21]

19. Many species of *real property* become *personalty* when separated from their physical connection with the soil. Thus, vegetables, trees, and fruits are treated as personalty when separated from the soil.[22] The same is true of minerals and metals which, while embedded in the earth, are realty, but when dug out are personal property.[23] Ice cut from ponds and rivers, and soil dug up to be used in another place are also personalty.[24] Coal, oil, petroleum,

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18 26 Ala. 493 (1855); 74 Miss. 450 (1896).
19 1 P. Wms. (Eng.) 94 (1706); 1 Atk. (Eng.) 447 (1750); 4 Gray (Mass.) 256 (1855); 779 E. C. L. (Eng.) 575 (1851).
20 63 Me. 350 (1873).
21 64 Pa. 134 (1870); 49 Minn. 412 (1892).
22 15 Vt. 221 (1843).
23 62 Pa. 232 (1869).
24 82 N. Y. 476 (1880).

percolating waters, and natural gas, while confined to the earth, are realty, but as soon as they are released and come to the surface they become personal property.[25]

Crops are liable to sale and execution for debt like other personal property, and the purchaser of them is entitled to go upon the land on which they are growing to gather them.[26]

20. Land by construction of law is a fictitious sort of land, which the courts consider as existing where a testator in his will has directed that a sum of money be expended in the purchase of land. Though no property has been bought, the courts will, nevertheless, deal with the money as if it were land. This is the doctrine of equitable conversion and it grows out of one of the maxims of equity; "equity considers that as done which ought to be done." It is to be noted that the doctrine of equitable conversion is not applied in every case where the above circumstances arise, but only where some particular or equitable purpose may be thereby subserved.

21. Hereditaments.—There are two kinds of hereditaments—corporeal and incorporeal—as before explained. *Corporeal hereditaments* are lands and structures thereon, or fixtures thereto. They comprehend concrete objects, such as have a material existence, things which can be handled, touched, or readily perceived by the senses.

Incorporeal hereditaments are rights issuing out of things corporeal (whether real or personal), or concerning, or annexed to, or exercisable within, the same. They are those hereditaments that have no material existence, that cannot be seen or handled, but, nevertheless, confer upon their possessor certain rights and privileges. Rights arising from lands—offices, rents, and the like—are incorporeal hereditaments.[27]

22. Ten kinds of incorporeal hereditaments are enumerated by Blackstone: *Advowsons*, *tithes*, *commons*, *ways*, *offices*, *dignities*, *franchises*, *pensions*, *annuities*, and *rents*. His

[25] 39 W. Va. 231 (1894); 53 Pa. 229 (1866).
[26] 85 Tenn. 720 (1887); 31 Ill. 120 (1863).
[27] 2 Black. Comm. 20.

definitions of some of these, which follow, must be taken with modifications when applied to their respective subjects at the present time.[28]

An **advowson** is the right to nominate a minister or other ecclesiastic to a benefice. This pertains particularly to the Church of England.[29]

Tithes are the tenth part of the yearly increase arising from the profits of lands, stock upon the lands, and the personal industry of the inhabitants. They, too, pertain only to the Church of England.[30]

Offices are the right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging.[31]

A **franchise** is a branch of the king's (or of the state's) prerogative, subsisting in the hands of a subject or citizen.[32]

Pensions are a right of sustenance or to receive certain allotments of victuals and provisions for one's maintenance.[33]

An **annuity** is a yearly sum chargeable on the person of the grantor.[34]

In the United States, there are but three incorporeal hereditaments of importance: *commons*, *easements*, and *rents*. The remaining seven named by Blackstone either do not exist there or are not heritable.

COMMONS

23. Common is a right which one man has in the land of another. Such a right is *common of pasture*, which gives one man a right to pasture his cattle on another man's property. The term is applied to similar rights, which differ only as to the kind of property in which the common exists. Thus, *common of turbary* is the right to dig turf or fuel on the land of another, and *common of piscary*, the right to fish on the land of another. Commons consume the soil or its products; easements do not; they use without consuming.[35]

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[28] 2 Black. Comm. 21.
[29] *Ibid.* 21.
[30] *Ibid.* 24.
[31] *Ibid.* 36.
[32] *Ibid.* 37.
[33] *Ibid.* 40.
[34] *Ibid.* 40.
[35] 3 Kent's Comm., p. 403.

EASEMENTS AND SERVITUDES

24. Although *easement* and *servitude* are convertible terms, *easement* properly refers to the *right* enjoyed by one and *servitude* the burden imposed upon the other.[36]

An **easement** is a liberty, privilege, or advantage which one man may have in the land of another without profit, by reason whereof the latter is obliged to suffer, or refrain from doing, something on or in regard to his own tenement, for the advantage of the former; or, a right which one proprietor has to some profit, benefit, or beneficent use out of, in, or over, the estate of another.

25. The law of easements and servitudes relates exclusively to land and cannot be applied to a chattel. The essential qualities of an easement are these: They are incorporeal, incident to, and arising out of land; they are imposed on corporeal property; they confer no right to a participation in the profits arising from such property; they are imposed for the benefit of corporeal property; there must be two distinct tenements—the dominant, to which the right belongs, and the servient, upon which the obligation rests. In other words, there are in every easement two estates; the dominant estate, which confers the right to do certain acts or exercise certain privileges, called easements, upon the land of another, and the servient (or serving, bearing) estate, which must allow such acts to be done, or privileges to be exercised, upon it.[37]

26. Profits A Prendre.—Easements are to be distinguished from *profits a prendre*, which are a peculiar species of easements. A **profit a prendre**, literally, is the right to take a thing as profit. In a legal sense, the term means the right of taking something which is the product of the land. In its nature it is an incorporeal right imposed upon corporeal or tangible property. It may be appurtenant to a dominant tenement, in the nature of an easement, or it may be a right

[36] Bouv. Law Dict., Vol. 1, p. 631. [37] 47 N. J.Eq. 31 (1890); Washb. Easem., pp. 3–8.

in gross. It may be held apart from the possession of land; when attached to other land, it is in the nature of an easement; when not so attached, it cannot properly be said to be an easement, but is an interest or estate in the land itself and is capable of delivery, which an easement is not.[38]

The right can only be acquired by grant or prescription, and cannot be claimed by custom. A person may, by grant, have the right to take coal from the land of another, which would be a *profit a prendre;* so also, is the right to take seaweed from the shores; but the privilege of watering cattle at a pond, or of taking water for domestic purposes, is an *easement* and not a *profit a prendre.*[39]

27. License.—Another right pertaining to land, which may be exercised by a person not the owner of it, is called a **license.** It is a permission or an authority to make use of another's land in some specific way, or to do certain acts thereon without which authority the use of, or the acts done with respect to, the land would be illegal. It differs from an easement in that it is not created by deed or by prescription, and hence it is not a right or interest issuing out of land, no *jus in re* (no right in the thing itself); it is simply a naked authority.[40] It does not create a duty nor impose an obligation on the part of the owner of the land to provide against the danger of accident. It may be revoked at any time at the pleasure of the licenser, and is revocable whether created by writing under seal or by parol.[41]

28. Kinds of Easements.—Easements are *appendant* or *appurtenant* to land, and *in gross.* The former are the most common kind, being such as are attached to the ownership of the land—to some dominant estate.

29. An **easement in gross** is a right enjoyed by a person in another's land, irrespective of ownership or occupancy of the land; every right over the land of another

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[38] Bouv. Law Dict.; Jones, Easements, Sec. 49; 53 Pa. 209 (1866).

[39] 48 Me. 100 (1861); 5 Ad. & Ell. (Eng.) 758 (1836).

[40] Tiedeman, Real Property, Sec. 651.

[41] 71 Ill. 500 (1874).

that is not appurtenant to, or exercised in connection with, the occupancy of the land is an easement in gross, and is personal to the one who enjoys the right himself. An easement will never be presumed to be *in gross* when it can fairly be construed as appurtenant (attached) to the land.[42]

ILLUSTRATION.—If A own a tract of land, and B, who also owns a tract of land, grants a right of way to A from his (A's) land over B's land, this is an easement *appurtenant;* but if A own no land and B give A a right of way over his (B's) land, this is an easement *in gross*. The principal distinction is that in the first instance there is, and in the second there is not, a dominant tenement.[43]

30. An **easement appurtenant** passes with a deed or conveyance and is descendible. In some of the United States, it is established that an easement *in gross* may be assigned or transmitted by descent, especially where it is a *profit a prendre*.[44] In England and some of the United States, it is settled that an easement, or mere right, *in gross*, being a personal right, is neither assignable nor inheritable. Such a grant may not be made assignable or inheritable by any terms in the grant.[45] Easements are also *continuous* or *discontinuous*.

31. **Continuous easements** are those whose enjoyment is, or may be, continuous, without the necessity of the actual interference by man, and can always be seen on careful inspection, such as a watercourse, a right to light and air, or a drain.[46] **Discontinuous easements** are those enjoyments which depend upon the actual interference of man, at every time of enjoyment, and that only at intervals; such are rights of way, rights to draw water, and the like.[47]

32. There is also a kind of *appendance* of an easement upon another easement, called **secondary easement;** it passes with the principal easement, as being necessary and convenient to the enjoyment of the same. Thus, the grant of a right to pasturage carries the right of way to and from

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[42] Washb. Easem., p. 4; 116 Ill. 11 (1886).
[43] 38 Cal. 111 (1869).
[44] 61 Pa. 21 (1869); 6 Cush. (Mass.) 137 (1850); 125 N. Y. 380 (1891).
[45] 3 Kent's Comm., p. 420; 2 M. & K. (Eng.) 517 (1834); 33 Fed. Rep. 146 (1887).
[46] 21 N. Y. 505 (1860); 43 N. J. Eq. 62 (1887); 50 N. J. Eq. 589 (1892).
[47] 42 Minn. 398 (1890).

the pasture, and a deed which conveys certain easements and provides that no easement shall pass by implication will not exclude secondary easements. Like easements, rights of *profit a prendre* may be either in gross, or appurtenant to land, and both easements and *profits a prendre* may be held for life, in fee, or for years.[48]

The easements of most frequent occurrence are rights of way; the right to enter upon the land of another for various purposes, such as to erect booths or take water for domestic use; the right to cut and take ice from a pond and have access to the ice house; the exclusive right to a pew in a church; the right to use an alley or a burial lot in a cemetery.[49]

33. An easement may be created by *grant* and by *prescription*, which presumes the existence of a grant. The **grant** may be express or implied. An *express grant* carries with it not only the beneficial use and enjoyment of the property, but everything necessary to that enjoyment which it is in the power of the creator of the easement to grant. What easements pass by the grant, or deed, is determined by the intention of the parties, as gathered from the words of the grant, or deed, and the surrounding circumstances.[50]

34. Reservations and Exceptions.—It is competent for the grantor to qualify his grant in any way that he thinks proper. Such qualifications take the form of a *reservation* or of an *exception*. By a **reservation,** a grantor reserves to himself out of the granted premises some new thing not in existence before, such as rent or an easement. An **exception** is where certain things are taken out of the grant, as where a certain house is specified not to be subject to the easement. A reservation must be to the grantor, or person making it, and not to a stranger, and must contain the word *heirs* to create a descendible estate

[48] 116 Ill. 11 (1886); 41 Minn. 270, 274 (1889); 96 N. Y. 604 (1884); 53 Pa. 209 (1866).

[49] 96 N. Y. 604 (1884); 134 N. Y. 118 (1892); 66 Pa. 412 (1870).

[50] 12 Ill. App. 115 (1882); 107 Mass. 591 (1871).

therein. An exception will pass a fee, though the word *heirs* be not used.[51]

35. Implied Grants. — An **implied grant** is one presumed to exist; one not created by specific words or writing. The courts discountenance the creation of easements in this manner. By the implied grant of an easement, all continuous and apparent easements will pass that are necessary to the reasonable enjoyment of the property granted, and which have been, and are, at the time of the grant, used by the owner of the entirety for the benefit of the land granted. When the owner of two parcels of land conveys one of them, he impliedly grants those apparent and visible easements that are essential to its reasonable use. An easement might be so created, for instance, in a drain. To create an easement in this way it must be shown: (1) That there is a separation of title, (2) that before the separation, the use which gave rise to the easement had existed long enough to show that it was meant to be permanent, and (3) that the easement is necessary to the beneficial enjoyment of the land granted.[52]

36. Merger. — An easement is extinguished by **merger,** or by incorporation, of the dominant and servient estates; that is, when the same person becomes the owner of the easement, or dominant estate, and of the property subject to the easement.[53] Consequently, if the owner of the premises, after extinguishment of the easement by merger, make a conveyance, no easement is thus transferred. To pass an easement after merger, it is necessary to revive it, or rather to create it anew.[54]

37. Covenants, Conditions, Contracts. — It is not necessary that the easement be created in the deed conveying land; it may be created by special *contract* or *agreement*, or by *covenant*, or by *condition*. Where created by a covenant considered by the law to run with the land, the easement

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[51] 18 Iowa 352 (1865); 93 Mich. 599 (1892).

[52] 37 Ch. Div. (Eng.) 490 (1888); 43 N. J. Eq. 62 (1887); 153 Pa. 294 (1893).

[53] 60 Mich. 238 (1886); 54 Me. 276, 289 (1886); 17 R. I. 495 (1891).

[54] 60 Mich. 238 (1886); 50 Pa. 417 (1865).

will bind the grantees of the land, to any number, unless it be extinguished in some way. Whether a covenant will run with the land or not depends upon whether it is for its benefit or not.[55]

38. Appurtenances.—If a grant, or deed, convey land with its appurtenances (things belonging to it), this will be sufficient to convey necessary easements also. In this way an easement already in existence can be transferred, but no new easement can be established.[56]

39. Prescription.—A **prescription** is a title acquired by possession for a certain length of time and in the manner fixed by law. The statute of limitations defines the length of time and the manner in which a title by prescription may be acquired. The time differs materially in the United States; in some states, only five years are necessary, in others, seven, ten, fifteen, twenty, and twenty-one years must pass. This is also called *title by adverse uses* or *title by adverse possession*.[57]

40. The use must be adverse to that of the owner and such as to give him a right of action; it must be so visible, open, and notorious as to raise a presumption that the owner is aware of it. His knowledge is construed to be acquiescence, acquiescence being indispensable to easements by adverse use. The fact that the owner knew of the adverse use and made no resistance to it or brought no action to prevent it, justifies the inference that it was done with his consent, or that he granted the right. Where the use is exercised in the face of resistance, or by force, or notwithstanding the protests of the owner, neither consent nor a grant can be presumed, and a mere verbal resistance is sufficient to prevent the running of the statutes of limitations.[58] It must not be exercised by favor or courtesy or license of the

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[55] 68 Me. 173 (1878); 3 Cush. (Mass.) 500 (1849); 121 Mass. 457 (1877); 115 Ill. 199 (1885); 13 N. H. 360 (1843).

[56] 107 N. Y. 384 (1887); 4 N. H. 380 (1828); 2 Cush. (Mass.) 327 (1848).

[57] 51 N. H. 324 (1872).

[58] 66 Conn. 337, 349 (1895); 120 N. Y. 458 (1890); 144 Mass. 325 (1887); 30 N. J. Eq. 180 (1878).

owner, such uses not being adverse.[59] If the use be continued after revocation of the license, it will then be adverse. Merely passing through an alley kept open for the use of the adjoining property will not ripen into a right to continue such passing by any lapse of time, no repairs being made, nor acts being done to give the owner notice of a claim of right to pass, as distinguished from a mere license;[60] when the use has been established by prescription, it is immaterial that it originated under a license or agreement.[61]

41. The enjoyment of the easement must also be uninterrupted, and should unity of possession and ownership occur at any time, then, although the use continues, the enjoyment of it as an easement has been broken and the title fails. It need not be used during each year (as a right of way) but only more or less frequently, provided it be as often as the claimant has occasion to pass. A right acquired by prescription can never exceed the use in which it has its origin. It is measured by the extent of that use, and the extent of the enjoyment measures the extent of the right.[62]

42. Rights of Way.—A **right of way** is the right of passing over the real property of another. It may arise by grant, prescription, or necessity.[63] A right of way must be used for the purposes for which it was granted and according to the intention of the parties, for a right of way for carriages does not confer a right of way for farming purposes.[64] Furthermore, a grant of a right of way simply gives the right of passing over the premises, not the right to erect any structures, or to pile lumber on the way.[65] The grant only passes what is necessary to its right and proper enjoyment.[66]

43. Ways of Necessity.—A conveyance of land which is entirely enclosed by other land of the grantor carries with

[59] 10 Pa. 126 (1848); 91 Wis. 386 (1895); 12 Allen (Mass.) 582 (1866).
[60] 93 Ga. 298 (1898).
[61] 84 Iowa 65 (1891).
[62] 51 N. H. 324 (1872); 105 Mass. 319 (1870); 129 N. Y. 252 (1891); 86 Me. 380 (1894).
[63] Cent. Dict.
[64] 59 N. H. 317 (1879); 130 Ind. 21 (1891).
[65] 49 Me. 207 (1860); 9 B. Mon. (Ky.) 20 (1848).
[66] 45 Md. 337 (1876).

it, as appurtenant to the premises, a **right of way of necessity** over the adjoining land of the grantor; in other words, if the land purchased be entirely surrounded by the land of the vendor, the law implies a grant by the vendor to the vendee of a right of way through his (the former's) land, to enable the latter to have ingress and egress to his (the latter's) land; so, when land has been severed by voluntary conveyance, one portion of which is inaccessible except by passing over the other or by trespassing on the lands of a stranger, a grant of way of necessity is presumed between the parties.[67]

44. If premises be leased which cannot be approached except over the landlord's grounds a right of way of necessity is created, which may be designated by the landlord, or, upon his failing so to do, by the tenant; and if a creditor, at sheriff's sale, buy land of his debtor that is inaccessible except over other land of the debtor, he has a way of necessity over such land, in order to reach the land purchased at the sale.[68] But a person is not allowed to claim a road over another's land, as a way of necessity, when he can have one over his own land. A way of necessity is always that of a *strict necessity*, and never exists when an owner can get at his property through his own land, though that way may be too steep and narrow; but a way of necessity will pass by a conveyance, if such way over his own land cannot be made without unreasonable labor and expense, for the word *necessity* does not mean *absolute physical necessity*, but only *reasonable necessity*.[69] The mere fact that such way is not convenient, or that the way of necessity is more convenient, is not sufficient, though the way of necessity must be a convenient way and is ordinarily limited only by the necessity for its use connected with all lawful uses of the land to which it is appurtenant, and not by the use made of the land at the time of the grant.[70]

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67 83 Me. 91 (1890); 53 Mich. 507 (1884); 14 Colo. 429 (1890).

68 123 Ind. 372 (1889); 58 How. Pr. (N. Y.) 77 (1879).

69 8 Allen (Mass.) 1 (1864); 86 Me. 279 (1894); 49 Conn. 71–78 (1881).

70 125 Mo. 502 (1894); 62 N. H. 338 (1882).

45. The grant of a right of way does not convey the soil, the fee, or any corporeal interest, and the owner of land subject to a right of way, or of any easement, may use it in any way not inconsistent with the easement.[71] Therefore, he may open windows into the alley, because by so doing he does not interfere with the right of way; and he may build over it, so that he leaves a space open sufficiently wide, high, and light that the way is substantially as convenient as before for the purposes for which it was reserved; for the owner of the way has no right to light and air above the way, but only the right of passing and repassing, with such incidental rights as are necessary to its enjoyment. Nor has the owner of the land the right to erect a gate at the entrance of the way, though he may at the terminus, or end, of it.[72]

46. If the way be gained by prescription and no gates or bars be erected during the required term, none can be erected. The use of the way is to be determined by the use during the time of prescription, so that if gates have been across the way for forty years, it means that the way is so subject.[73] But a way for agricultural purposes may properly be subjected to gates and bars, whether created by grant or prescription; and for the protection of his field, the owner may erect gates, so that he reasonably regard the uses of the right of way. He has also the right to plow the land, so that it does not interfere with the way. The extent of the right of way and the duty of the respective owners depend upon the words of the grant and the circumstances of the case.[74]

47. Public Ways, or Highways.—A **public way,** or **highway,** is any road or way over which all persons have a right to pass—a road or street maintained for the general convenience of the public. As specifically regarded in the present inquiry, a *highway* is a public easement in a

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[71] 66 N. H. 36 (1891).

[72] 144 Mass. 88 (1887); 129 N. Y. 676 (1891); 2 Metc. (Mass.) 457 (1841); 153 Ill. 534 (1894); 44 Ill. App. 589, 591 (1891).

[73] 127 Ind. 164 (1890); 132 Ind. 71 (1892).

[74] 82 Me. 379 (1890); 167 Pa. 18 (1895); 31 N. Y. 366, 368 (1865).

particular piece of land over which all persons may pass and repass. A **turnpike** is a public highway and a public easement, and every traveler has the same right to use it, upon payment of toll (if required), as he would have to use any other public highway.[75] This kind of easement may be acquired by *common-law dedication*, by *statute*, and by *prescription*.

48. A **common-law dedication** is the setting apart of land for public use, and to constitute it there must be an intention by the owner, clearly indicated by his words, to dedicate the land to public use; but no particular formality is required.[76] It may be *express*, with or without writing, or *implied* by any act of the owner, such as throwing open his land to public travel; or plotting it and selling lots bounded by streets designated in the plot, thereby indicating a clear intention to dedicate; or by acquiescence in the use of his land for a highway; or his declared assent to such uses. Only the owner in fee can dedicate land to public use.[77]

To constitute a common-law dedication there must be an *acceptance* by the public, for an incipient dedication of a street does not convey a right of way until it has been accepted. Such acceptance may be shown by actual use of the grant for the purposes intended. The use of the land by the public for a reasonable time is sufficient to perfect the dedication without any specific action by the municipal authorities, either by resolution, repair, or improvements.[78]

49. In many of the United States, statutes regulate the opening and acceptance of streets. Simply laying out and filing a plat of a road, under the statute, does not constitute the road a public highway; the road must be opened or used for public travel and the public authorities must do some act with respect to it, such as keeping it in repair. These circumstances taken together will constitute the road a public highway. When property is dedicated by *statute*, it at once vests in the municipality in fee, in trust for the public. Statutes

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75 16 Pick. (Mass.) 175 (1834).
76 101 Cal. 271 (1894).
77 93 Cal. 43 (1892); 18 Ore. 73 (1889).
78 116 Mo. 379 (1893); 95 Cal. 463 (1892).

covering dedication of ways do not affect ways established by prescription.[79]

50. To acquire a public right of way by **prescription,** there must be an adverse use of the way for the statutory period, and this use must be continuous and of right. Acquiescence, without objection, in the public use for a long time, proves and indicates to the public an intention to dedicate, and if the owner so acquiesce and consent, the use need not be for the full statutory period, because the offer to dedicate and the use by the public have both been shown;[80] mere passive acquiescence by the owner of an unenclosed and unimproved lot in a town, or city, in its use by the public for streets or highway purposes, until such time as he may be able or willing to improve it, does not constitute a dedication.[81]

51. Rights of Abutters on Streets.—By the term **abutter on land** is meant one whose land adjoins, or is contiguous to, a street, or highway.

As a general rule, a grant of land, bounded by a highway, carries the fee to the center of the highway (provided at the time, the grantor owns to the center), subject to the public easement.[82] When lands overbounded by a way, either public or private, are conveyed, the law presumes it to be the intention of the grantor to convey the fee of the land to the center of this way, if his title extend so far; and a deed of land bounded by an alley or way carries the fee to the middle of the same with an easement or right of way over the other half.[83]

52. Irrespective of the rights of the public in a public street, the abutters have a right of way, as between themselves and their grantors; and they have a right of way among themselves, as to a street dedicated. Such private easements on the street not yet occupied by the public are independent of the public easement, and neither the municipal authorities

[79] 160 Ill. 509 (1896); 163 Ill. 401 (1896); 128 Mo. 10 (1895); 128 Mass. 63 (1880).
[80] 142 Mass. 324 (1886); 51 Minn. 381 (1892); 108 Cal. 589 (1895).
[81] 136 Pa. 294 (1890).
[82] 146 Mass. 585 (1888).
[83] 150 Pa. 595 (1892); 106 Mass. 554 (1871); 105 Mass. 410 (1870); 144 Mass. 371 (1889).

nor the owners can interfere with them.[84] They have, also, the right of access to and from, and passage over, the land so designated as a street, and also the right to light and air from and over it. These rights are called *property rights* in the nature of easements of light, air, and access.[85]

53. Land dedicated to the public uses, when abandoned, reverts to the landowner and is vested in him; for the right of the public being a mere easement, the owner of the fee may resume possession whenever there has been a full and lawful abandonment. This is the rule concerning a public road, street, and alley, when the fee remains in the owner of the land over which a public road has been established.[86]

A highway once established does not cease to be such until it be discontinued or abandoned by the public authorities; mere non-user will not amount to an abandonment, though it will be *prima facie* evidence of it. An abandonment must be voluntary and intentional. There are circumstances, however, under which an abandonment will be presumed.[87] Where, for example, a person, whose property bordered upon a highway, erected a fence along the line of the street in such a manner as to lessen its width, and the city recognized the fence as the true line of the street, acquiescing in this adverse user for twenty-eight years, the city was not permitted at the expiration of that time to assert a claim to the property within the fence.[88]

54. Light and Air.—Whenever one portion of realty is granted which is visibly dependent upon the remaining portion for its beneficial enjoyment—for its supply of light and air, for example, or for its supply of water—the right to the air, water, or other incident, will pass to the grantee.[89] But the grant of light and air is not implied from the grant of a house having windows overlooking a lot retained by

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[84] 147 N. Y. 338 (1895); 144 N. Y. 316 (1895); 89 Ky. 212 (1889).
[85] 104 N. Y. 268 (1887); 107 Cal. 199 (1895).
[86] 59 Fed. Rep. 96 (1893).
[87] 59 Conn. 250 (1890); 103 N. Y. 77 (1886).
[88] 56 Ill. 45 (1870).
[89] 34 Md. 1 (1870); 67 N. W. R. 1,080 (1896); 158 Mass. 577 (1893).

the owner, notwithstanding the windows have overlooked the lot for twenty-one years or more.[90] The courts will not permit the owner to build a fence ten feet high, but he may erect a building to any height, and the legislature cannot deprive him of the right to do so simply because it obstructs the passage of light and air.[91] If the owner agree not to do so, his contract or covenant will bind him.[92] In England, the rule is otherwise. There, the uninterrupted enjoyment of a window for twenty years creates an easement in the light which comes through; and an easement in air moving in a definite channel can be acquired by forty years user.[93]

The column of light and air above a road, street, or waterway, is a part of such highway. To this light and air the owners of property bordering upon the highway have a right of which they cannot be deprived without compensation. But the right of way in an alley, or any private way, confers no right to have it kept open, to afford light or air to a person who has built his house with windows and doors opening thereon.[94]

55. Water Rights.—Easements are those created by act of the parties, or those given by law to every owner of land. Most water rights are of the latter class; such are the rights of navigation and of fishing in navigable waters as far as their ebb and flow extend. Above the ebb and flow of the tide the proprietors of land through which the river flows have the exclusive right of fishing in it, but the public has the right of navigation. In the case of a non-navigable stream, the owners of the property through which it flows can exclude all others from access to it except at a road or other public crossing. The persons through whose land the stream flows are called *riparian owners* or *proprietors*.[95]

56. Watercourses.—A **watercourse** is a living stream with defined banks and channels, not necessarily flowing all

[90] 115 Mass. 204 (1874).
[91] 103 Cal. 111 (1894).
[92] 143 Mass. 538 (1887); 167 Mass. 283 (1897); 146 Ill. 481 (1893).
[93] 11 H. L. C. (Eng.) 290 (1865); 25 Q. B. Div. (Eng.) 491 (1890); 33 Ch. Div (Eng.) 338 (1886).
[94] 117 Ill. 532 (1886); 144 Mass. 88 (1887).
[95] 125 Pa. 211 (1889).

the time, but fed from other and more permanent sources than mere surface-water, as a spring and flood water which is accustomed to overflow the adjacent lowlands in a defined channel, though, as a rule, flood water is construed to be surface-water.[96]

The term *watercourse* does not include the water accumulated from the melting of ice or snow, nor the surface-water following the depressions of the ground, nor sluiceways, though connected with the sea and having an ebb and flow.[97]

57. Every riparian proprietor, through whose land a watercourse flows, has a right to the reasonable use of the water. This right is not an absolute right of property, but is qualified by the equal right of other riparian owners. All the riparian proprietors have, by the common-law rules, precisely the same rights to waters flowing through their lands, and one proprietor cannot be permitted so to use the stream as to injure or annoy those situated on the course of it, either above or below him. They have no property in the water itself, but a simple usufruct—the right to enjoy it. This right extends to the water in its natural state, without material diminution in quantity, or alteration in quality.[98]

Accordingly, while each successive riparian proprietor is entitled to the reasonable use of the water for the supply of his natural wants and for the operation of mills and machinery, he has no right to flow the water back upon the proprietor above,[99] nor to discharge it so as to flood the proprietor below;[100] nor to divert the water;[101] nor to pollute the quality of the water by unwholesome or discoloring impurities.[102]

But, while such are the rights of the riparian proprietors when unaffected by contract, these rights are subject to endless modification on the part of those entitled to their enjoyment, either by grant[103] or by agreement[104] or by

96 107 N. Y. 650 (1888); 17 Neb. 180 (1885); 38 Minn. 212 (1888).
97 78 Mo. 504 (1883); 63 Conn. 1 (1893).
98 Bouv. Law Dict., citing 86 Ala. 587 (1888); 86 Ky. 44 (1887).
99 Bouv. Law Dict., citing 20 Pa. 85 (1852); 1 B. & A. (Eng.) 874 (1831).
100 17 Johns. (N. Y.) 306 (1820).
101 17 Conn. 288 (1845).
102 22 Barb. (N. Y.) 297 (1856); 57 Fed. Rep. 1,000 (1893).
103 Bouv. Law Dict., Vol. 2, p. 1,219, citing 3 Conn. 373 (1820).
104 19 Pick. (Mass.) 449 (1837)

twenty years adverse enjoyment from which a grant or contract will be implied in such a way as to adapt the uses of the water to the complex and multiplying demands and improvements of modern civilization.[105]

58. Surface-Water. — The owners of adjoining tracts of land owe each other certain duties with respect to the water that drains casually from the one piece of ground to the other; that is, **surface-water.** Under the common law, the owner of the upper estate (the land from which the water drains or flows) may detain, or withhold, the surface-water, while the owner of the lower estate (the land toward which the water drains) may repel it, or refuse to receive it, by obstructing its passage. Under the civil, or Roman law, the owner of the lower estate must receive, and the owner of the upper estate must not withhold, the surface-waters. Some of the United States have adopted the rule of the common law; others, that of the civil law.

The owner of a higher tract of land has a right to have the surface-water which comes naturally upon his premises pass off through the natural drains upon and over the lower lands, and may, by ditching, drain his own land into the natural channels, even if the quantity of water thrown upon the lower lands be thereby increased;[106] but water cannot be drained so that it will flow over other land than that over which it was accustomed to;[107] nor can a city, by raising the grade of a street, cause the water to flow over a lot;[108] or so construct sewers and drains that the surface-water of a large territory, which did not naturally flow in that direction, is gathered in a body and precipitated upon private premises to the injury of the owner;[109] though it is not obliged to keep open a culvert which drained adjoining land or surface-water.[110] If a railroad company so construct its road bed as to throw surface-water upon adjoining lands, it is liable in damages if injury result.[111] One has no right to erect a house

[105] Ang., Watercourses, Sec. 200; 86 Ala. 88 (1888).
[106] 158 Ill. 21 (1895).
[107] 86 Ala. 515 (1889).
[108] 85 Ill. 377 (1877).
[109] 111 Cal. 198 (1896).
[110] 64 Conn. 367 (1894).
[111] 73 Miss. 678 (1895).

so that the roof water will drain upon his neighbor's land in an unusual and injurious manner.[112]

59. Grant of Water Rights.—**Water rights,** when acquired by grant and irrespective of ownership of the soil, must be exercised in accordance with the terms of the grant and the intentions of the parties.[113]

When a right to use water for a specific purpose is granted, without being appurtenant to land, the presumption is that the use must be limited to that purpose, but, if appurtenant, the use will be taken as the measure merely; it may be used freely for other purposes, for, as a rule, the grant of water-power refers to the quantity of the water to be used and not to the purpose of the use.[114] The grantee of a fishery has the exclusive possession during the fishing season; the grantor is the owner at all other times;[115] and the grant to use the water of a certain spring does not prevent the owner from using or improving the remainder of the land.[116] An underground drain does not pass as an easement, unless mentioned in the deed.[117]

60. Lateral Support.—All land is dependent, more or less, for its **lateral support** upon the land adjoining. The right to have land so supported is an easement incident to its ownership, and a man may prevent his neighbor from excavating soil on his own premises so as to cause the land to cave in. It is immaterial that the excavation is conducted with due care; if it cause the adjoining property to cave in, it renders the person doing the excavating liable to pay damages measured by the injury done the land.[118] Minerals may be removed from land by the person entitled to do so, but he must leave a sufficient support for the surface. If the surface sink, he is liable in any event.[119] Where the ownership is thus divided, one person owning the surface and another the minerals beneath, the surface owes the lower estate an easement for access; and the lower estate owes the

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112 43 Minn. 476 (1890); 126 Ind. 85 (1890).
113 85 Me. 526 (1893).
114 148 N. Y. 432 (1896); 46 Me. 511 (1859).
115 61 Pa. 21 (1869).
116 45 N. Y. 671 (1871).
117 46 Hun (N. Y.) 399 (1887).
118 121 Ind. 195 (1889); 67 N. W. R. 519 (1896); 6 App. Cas. (Eng.) 740 (1881).
119 101 Pa. 348 (1882).

surface an easement for support. Enough minerals must be left to maintain the surface.[120]

61. The right to lateral support, however, does not relate to buildings upon the land. If ground cave in through the weight of the buildings erected thereon, the fact that the owner of the adjoining soil was making excavations, which indirectly caused the subsidence, is immaterial. Negligence figures in this case, however, for negligence in making the excavation will make the person guilty of it liable, notwithstanding the weight of the building contributed to the sinking of the land.[121]

Also, when one person owns the lower rooms in a building and another the upper stories, the latter has a right to have his portion of the tenement supported by the division walls in the lower part. Where two or more houses are so constructed as to require mutual support and are conveyed to different owners, or where separate portions of one dwelling become vested in different owners, a right of support passes by the conveyance to each grantee, unless excluded by the grant. But no action will lie against the servient tenement for mere failure to repair his tenement whereby the other estate is injured.[122]

62. Party Walls.—A **party wall** is a wall erected on the line between two adjoining pieces of land belonging to different persons, for the use of both properties; a structure for the common benefit and convenience of both the tenements which it separates. It is a wall built by one owner partly on the land of another for the common benefit of both.[123] Each adjoining owner is possessed in severalty of his own soil up to the dividing line and of that portion of the wall which rests upon it; they are not joint tenants or tenants in common of the wall. The soil of each, with the wall belonging to him, is burdened with an easement or servitude

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[120] 172 Pa. 566 (1896); *Ibid.* 438; L. R. 4 Exch. (Eng.) 348 (1868).

[121] 72 N. Y. 307 (1878); 21 N. Y. 505, 514 (1860); 22 Mo. 566 (1856).

[122] 109 Mass. 374 (1872).

[123] 2 Washb. R. P., p. 385; 118 Ill. 17 (1886).

in favor of the other, to the end that it may afford a support to the wall and buildings of such other.[124]

Unless the parties have entered into a special agreement to that effect, no obligation rests upon a person using a party wall to contribute to the expense incurred in erecting it.[125] The statutes upon the subject generally provide that the wall shall be built equally on the lands of the adjoining owners, at their joint expense; when only one owner wants to use the wall, he must bear the expense of its construction.[126]

63. When there is a party wall between two buildings and the owner of one of them takes it down for the purpose of rebuilding, he is required to erect another in its place within a reasonable time and with the least inconvenience. If the wall need repairing, the adjoining owner must contribute to the cost. But he is not bound to contribute to building the new wall higher than the old one, nor with more costly materials.[127] Being a party wall, it is for the mutual convenience and profit of adjoining owners, and the only restriction upon its use is that it shall not be detrimental to the other. Using a party wall means making use of it in the process of the construction of a house on the adjoining lot; either of the adjoining owners may deepen the foundation or increase the height of the entire wall, being liable for any injury to the other building.[128]

A party wall ceases to be such, and the mutual easement ceases, when the building is destroyed; the tenement in such event reverts to the original conditions of ownership. If either attempt to rebuild the wall, the other can enjoin him; and if he do rebuild without agreement, or statutory requirement, he cannot make the other party pay, for there is no obligation on either party to rebuild at his own expense.[129]

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[124] 2 Bouv. Law Dict., p. 609, citing 57 Miss. 746 (1880); 32 Pac. Rep. (Ore.) 681 (1893).

[125] 18 Ill. App. 423 (1886); 139 Mass. 29 (1885).

[126] Bouv. Law Dict., citing 4 Sandf. Ch. (N. Y.) 72 (1846); 31 Ind. 216 (1869); 16 N. E. R. 747 (1888); 44 Hun (N. Y.) 91 (1887).

[127] 3 Kent's Comm. *, p. 437.

[128] 152 Mass. 176 (1890); 162 Mass. 86 (1894); 159 Mass. 427 (1893).

[129] 167 Pa. 296 (1895); 63 Ala. 356 (1879).

DESTRUCTION, OR EXTINGUISHMENT, OF EASEMENTS

64. When the purpose for which an easement was created has ceased to exist, the easement is extinguished, unless created by grant.[130] An abandonment has the same effect, but the abandonment of the right must be more than a mere temporary cessation. A right of way ceases to exist when the estate to which it is appurtenant ceases to exist. By the common law, an easement is extinguished when the same person becomes the owner of the dominant and of the servient tenements, or the owner both of the easement and the estate in which the easement exists.[131]

65. Right to Repair.—The grantee of a right of way may enter upon the land subject to the easement and construct a road bed, and keep the same in repair. He may break up the soil, level irregularities, fill up depressions, blast rocks, remove impediments, and supply deficiencies, in order to constitute a good road. He has a right to exclude strangers from it, and to restrain its use by the owner of the servient estate; but one of several owners of a right of way may not make such repairs, or changes in the grade or surface, as would make it less convenient and useful to any one who has an equal right in the way.[132]

RENTS

66. Definitions.—**Rent** is a certain profit issuing at stated periods out of lands and tenements corporeal. As commonly defined, rent is a compensation or return made periodically, or fixed with reference to a period of time, for the possession or use of property of any kind, generally reserved by a lease. The characteristics of rent are: It must be certain or capable of being reduced to a certainty; it must issue at stated periods from lands or tenements corporeal—from something which the landlord may seize if

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[130] 138 Ind. 200 (1894); 72 N. Y. 174 (1878).

[131] 51 Md. 407 (1879); 121 Mass. 3 (1876); 140 Mass. 254 (1885).

[132] 119 N. Y. 37, 42 (1890); 146 Mass. 585 (1888); 158 Mass. 426 (1893).

default be made in payment of the rent; conversely, it cannot proceed from incorporeal hereditaments.[133]

67. At common law, there are three kinds of rents: *Rent-service*, by which the tenant of land or other tenement owed his landlord certain feudal services, or a money equivalent; *rent-charge*, or *fee-farm rent*, which is a charge on lands or tenements, in the form of rent, in favor of one who is not the landlord; and *rent-seck* (now abolished by statute), which is a rent charge in which the landlord has no right of distraint for arrears of rent. In both rent-service and rent-charge, the landlord has this right.[134]

68. **Ground-rent** is the rent at which ground is let for building purposes. Where there is a conveyance of land in fee, that is, a deed or conveyance of the absolute ownership of land, subject to the payment of a certain rent, it is a ground-rent. In England, a ground-rent is a rent-charge, and in Pennsylvania and Maryland, the only commonwealths of the United States in which such rents exist, a ground-rent is a rent-service. In Maryland, the name *ground-rent* is applied to leases for terms of ninety-nine years, renewable perpetually.

69. Ground-rents are *redeemable* and *irredeemable*, the latter being irredeemable *from creation* and those which *become* irredeemable. A **redeemable ground-rent** is one in which land can be freed from encumbrance by the payment of the principal sum within a certain time named in the deed. A ground-rent **irredeemable from creation** is one in which the ground cannot be freed from encumbrance, the rent being a perpetual charge thereon.

A ground-rent originally redeemable may become irredeemable by failure of the tenant to redeem within a certain time. If the ground-rent deed provide for the redemption of the land within five years, the payment of the money within the five years will release it from further payment of rent. But, in the old ground-rent deeds, there was a

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133 2 Black. Comm. 41; Cent. Dict.; see *The Law of Landlord and Tenant.*

134 Stat. 4, Geo. II, c. 28.

provision whereby the ground-rent became a perpetual charge upon the land in the event of non-redemption within the time specified. This species of ground-rent is now practically extinct, as are also any *perpetual ground-rents*. Their creation is so restricted as to make almost impossible the creation of an irredeemable ground-rent to charge land forever. Ground-rents may be freely transferred, but the transfer must be by deed to be effective.[135]

ESTATES IN REAL PROPERTY

70. Definitions.—An **estate** is the legal position or status of an owner, considered with respect to his property; ownership, tenancy, or tenure; property in land or other things. The term *estate* in its limited sense, and as it pertains to our present consideration, properly and technically means the degree, quantity, nature, and extent of interest which a person has in real property.[136]

Real estate is an interest in a real thing; it includes every possible interest in lands, except a mere chattel interest.[137]

Tenure is the nature of the right or title by which property, especially real property, is held.

A **tenant** is the one who holds real property by any kind of title; specifically, the term *tenant* is applied to one who holds real property under a superior owner, as a lessee or occupant for rent; it is used as correlative to *landlord*.[138]

71. Estates in real property are herein treated with respect to (1) the quantity of interest, (2) the time of enjoyment thereof, and (3) the number and connection of the tenants.[139]

The **quantity of interest** in an estate is determined by the time during which the tenant is to enjoy it; such as an estate to a man and *his heirs*, or an estate for one year.

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[135] Act of Apr. 22, 1850; Purd. Dig. 858, Pt. 2; Mitchell, Real Est. and Conv., p. 71.

[136] Cent. Dict.

[137] 9 Cowen (N. Y.) 81 (1828).

[138] Cent. Dict.; see *The Law of Landlord and Tenant*.

[139] 2 Black. Comm. 103.

Thus considered, estates are either *estates of freehold* or *estates less than freehold.*

A *freehold estate*, or a *freehold*, as it is commonly called, is any estate of inheritance or for life in real property, held by free tenure. Freeholds are those *of inheritance* and those *not of inheritance.* Those of inheritance may be *absolute* or *limited.* An estate of inheritance is one in which a man has such an interest that he may dispose of it upon his death as he sees fit.

72. Freehold Estates of Inheritance.—A **freehold estate of inheritance absolute** is a fee simple. A tenant in fee simple is he who has lands, tenements, and hereditaments, to hold to him and his heirs forever.[140]

The word *fee*, technically, means inheritance. An *estate in fee* is an estate of inheritance, an estate that may descend according to law without conditions or qualifications. When the word *fee* is used alone, it is understood to mean *fee simple.* At common law, the word *heirs* is necessary to create a fee simple by inheritance. This is now true only of deeds. A deed to convey an estate in fee simple must convey to one and his heirs. Consequently, a deed to a person and his generation to endure as long as the waters of a certain river should run was held to pass a life estate only. An example of an estate in fee simple is a grant such as this: "I give the estate of Whiteacre to J. S. and his heirs forever."

73. The amount of a man's interest is determined by its duration. According to their duration, estates or interests in lands are classified as *estates in fee simple*, *in fee tail*, and *for life.* Of these, the greatest is the estate in fee simple, the largest possible interest which a man may have in landed property. It is the ownership of land by a man and his heirs forever, in which is included the right of the owner or of his heirs to freely transfer or encumber it.

74. An **estate in fee simple** is that interest in lands which can be freely alienated by its owner during his life, and which will, on his death, if left undisposed of by him, descend

140 Co. Litt., Sec. 1.

beneficially to the next heir or heirs, lineal or collateral, and however remote in degree, of the last purchaser.[141]

By *last purchaser* is meant the last person who took the estate by purchase. A tenant in fee simple is not responsible to any one for any lawful use he may make of the land. He may dig it up to search for minerals, may cut down trees, destroy buildings, erect them, ruin or improve the land, as he sees fit. Such an estate can be transferred only by solemn deed *inter vivos* (between living persons) accompanied by *words of inheritance*, or by last will duly executed. The classical form of the words of inheritance is "and his heirs," following the name of the transferee. Thus, a limitation to a person *and his heirs* in an appropriate instrument gives that person a fee simple. The rule with regard to wills is not so strict. Since it is customary in interpreting wills to follow, so far as may be, the actual intention of the testator, any words which disclose an intention to give or devise a fee simple will be sufficient.[142]

75. An **estate in fee tail,** or an **estate tail,** is an estate in fee with certain limitations. It owes its creation to an old English statute,[143] and is an interest given to one and certain of his issue; as where lands are given to one and his wife and the issue born of their bodies. Obviously such an estate is liable to be defeated in several ways. The person and his wife to whom the interest is given may never have children; or their children, if they had any, might not survive them. Under the English statute before mentioned, if the grantees have no children, or the estate were otherwise defeated, the land reverted back to the original owner, the grantor.

76. Estates tail are: (1) The estate in tail *general*, (2) the estate in tail *male* or *female general*, (3) the estate in tail *special*, and (4) the estate in tail *male* or *female special*.

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141 Jenks's Modern Land Law, p. 27.

142 *Ibid.*, pp. 27, 29; see *The Law of Wills.*

143 Stat. *De Donis Conditionalibus* (concerning conditional gifts), 3 Edw. I (Eng.), c. 1 (1285).

The estate in tail *general* is where land is given to a man and the heirs of his body. In England, by statute, such an estate may be created by deed by a transfer to one in tail. Under the laws of descent the lineal issue of the grantee can take, but collateral issue is excluded.[144]

The estate in tail *male* or *female general* differs from the estate in tail *general* in that the issue named in the limitation is required to be of a particular sex, such as an estate to a person and the heirs male of his or her body. In this case any of the heirs male are capable of inheriting. The estate in tail female general is of rare occurrence, but is governed by the same rules as the estate in tail male general.

The estate in tail *special* is a limitation to the issue of two persons, who, of course, must be of different sexes, and they must not be within the prohibited degrees of consanguinity.

ILLUSTRATION.—The grant of lands to X and the heirs of his body by Y, or to Y and the heirs of her body by X, creates an estate in tail special. It is not necessary that X and Y be married when the estate is created; they immediately become joint tenants of an estate tail inheritable only by their joint issue. If they do not fulfil the conditions requisite under the instrument creating the estate, they take a joint estate for the life of the survivor, upon whose death, the lineal heirs of both take as tenants in common.

After the first descent, an estate in tail special becomes an estate in tail general.

The estate in tail *male* or *female special* is an estate given to a man *and the heirs of his body by his wife*, or some similar expression. It is governed by the same rules as the estate in tail male general.[145]

77. The purpose of the statute was to prevent the alienation of estates tail by the first tenant. Before its passage, when an estate was given to a man and the issue of his body, it was customary to treat it as a fee simple upon the birth of issue, and to convey it as if it were such, thereby preventing the estate from ever reverting back to the donor, though the issue might die in the life of the first tenant.

144 44 and 45 Vict. (Eng.), c. 41 (1881). 145 Jenks's Modern Land Law, p. 32.

To prevent this the statute was passed.[146] It answered its purpose until the ingenuity of the conveyancers found a way of evading its provisions. An estate tail was said to be entailed upon a man, and when he took steps to convert his estate tail into a greater estate, a fee simple, this was called barring the entail. The process generally used for accomplishing this was called a *common recovery*, a kind of conveyance, or fictitious proceeding, which operated as an absolute bar to estates tail, and the remainders and reversions expectant on the determination of such estates.[147] In England it became obsolete in 1833 by the abolishment of fines and recoveries, and barring the entail was permitted by a simple enrolled deed. In the United States, the creation of new estates tail has been made impossible by statute in most of the states, but there are sufficient old estates tail existing to make a knowledge of their incidents necessary to conveyancers and other persons interested in transfers of real estate.

78. As a tenant in tail has the power, even in England, to change his estate into a fee simple at pleasure, and as his powers of dealing with the land are almost unrestricted, the difference between the estate tail and the estate in fee simple is reduced to almost nothing.

This does not apply to two special cases of tenancy in tail. The first is tenancy in tail after possibility of issue extinct; as where land is given to A and the heirs of his body by B, and B dies leaving no issue by A, or leaving issue who die. The estate tail in this case obviously must end with the life of A. His powers here are not the unlimited powers of an ordinary tenant in tail.

The second case is tenancy in tail where the reversion is in the crown. For example, where the estate has been given by the crown to A in tail general, with the provision that, upon the failure of A's issue, the land is to revert back to the crown, the crown occupies the position of reversioner.[148]

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[146] Stat. *De Donis Conditionalibus*, 3 Edw. I (Eng.), c. 1 (1285).

[147] 2 Black. Comm. 357.

[148] Jenks's Modern Land Law, p. 38.

In all cases, the part of an estate limited to go back to the donor or his heir after an estate tail is called the *reversion*. In this case, the tenant may not take advantage of the privileges given ordinary tenants in tail under the English Fines and Recoveries Act.[149]

79. Freehold Estates Not of Inheritance. — An **estate for life** is the least estate of freehold that can be created. It is an estate granted to a person to be held during his own life or the life of another. Such estates may be created either *expressly* or *by operation of law*, and it is not necessary to use words of inheritance, such as "and his heirs," in creating them.

A conveyance of a life estate is generally coupled with a limitation over, that is, with a gift of the remaining estate to another; as an estate granted to A for life, and upon A's death to go to C in fee. The usual form of expression would be to A for life with remainder to C in fee. The estate remaining, that is, C's estate, is called a *remainder*. Under these circumstances it naturally follows that A, in dealing with the land, must respect the rights of those who come after him.

Life estates created by operation of law include tenancy in tail after possibility of issue extinct (above described), tenancy by the curtesy, and tenancy in dower.

80. Tenancy by the Curtesy. — An **estate by the curtesy** is one which entitles a man to a life interest in the real property of his deceased wife, which she held in fee simple, or fee tail in actual possession, not disposed of during her lifetime. At common law to entitle the man to the interest, there must have been children born alive to them who were capable of inheriting her estate. As a general rule, it is no longer necessary that issue be born to entitle the husband to his estate by the curtesy.[150]

81. Dower. — **Dower** is the portion which the law allows to a widow *for her life* out of the real property which her

[149] Stat. 3 and 4 Wm. IV (Eng.), c. 74 (1833). [150] See *The Law of Husband and Wife.*

deceased husband held in fee simple or fee tail. Where the husband holds an estate of inheritance at his death, she is entitled to one-third of all his lands and tenements for life. This common-law institution exists today, but the amount to which she is entitled is regulated by statute in the various jurisdictions.

82. Rights of Life Tenants. — The **rights of a tenant for life** to deal with the property are as follows: He may make whatever use of the land is consistent with its being handed over to his successor in the condition in which he received it; but his representatives (his heirs, executor, or administrator) have no claim upon the land after his decease, whatever improvements he may have made upon it.

Every legal tenant for life has the right of *estovers*, that is, the right to cut all the timber necessary for the ordinary needs of farming, whatever its effect upon the land. The right extends to the estovers called house-bote, plow-bote, and hay-bote. *House-bote* is the right to cut the timber necessary for repairs and fuel for his house; *plow-bote* is the right to cut timber for the repair of his agricultural implements; and *hay-bote* is the right to cut timber to maintain his hedges. These estovers are chiefly perquisites, or rights, of tenants for life under the ancient English law. They still exist in England but are rarely mentioned in the United States.[151]

83. A tenant for life may not commit waste. *Waste* includes any act which will deteriorate the value of the land or which will change its character. It is immaterial that the commission of the waste may benefit the land; the fact that removing trees may enhance its value by adding new arable land to the freehold, or that mines opened may enrich the remainder-man is immaterial; the commission of such acts is waste.

Permissive waste is where the tenant permits buildings or other parts of the freehold to fall into decay through failure to repair them. In the absence of an express

[151] Jenks's Modern Land Law, p. 40; 2 Black. Comm. 35.

agreement to repair, he is not generally held liable for failure to do so.[152]

In the United States, tenants for life, or for years, are required to make all the repairs necessary to keep the premises in as good condition (ordinary wear and tear excepted) as they were when they entered into possession; and for that purpose they may use the timber to be found on the land.[153]

There are two exceptions to the rule that the representatives of the life tenant have no claim upon the land after his death, (1) with regard to *emblements*, (2) with regard to *fixtures*.[154]

84. Emblements are the product of crops sown by a tenant with a limited estate (a life estate or estate for years) which have not matured at the termination of his estate. To entitle a tenant to emblements, his estate must be of uncertain duration and must not come to an end by his own act or fault. Certain phases of this subject are now regulated by statute in England, but only particular cases fall within the act, so that the subject has lost none of its importance.[155]

In England, the powers of a tenant for life are regulated by the Settled Land Act and its supplements, which confer upon the tenant powers almost coextensive with those of an absolute owner, subject to restrictions in favor of his successor. From the operation of these statutes, the estate of dower is excepted. This, however, does not affect the rights of emblements, estovers, permissive waste, and fixtures. The powers of a tenant by curtesy, besides the usual powers of a tenant for life, include those conferred by these statutes.[156]

85. Estates for the life of another, called in law *estates pur autre vie*, may be created in England for an estate for life, for an estate tail, or for a fee simple. That is, it may be an

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152 41 Ch. Div. (Eng.) 532 (1889).

153 Tiedeman, Real Property, Sec. 77; 1 Washb. R. P., Sec. 149; 32 N. H. 147 (1855).

154 See Fixtures, *supra*.

155 Jenks's Modern Land Law, p. 44; 14 and 15 Vict., c. 25, Sec. 1 (1851).

156 Stats. 45 and 46 Vict., c. 38 (1882); 47 and 48 Vict., c. 18 (1884); 50 and 51 Vict., c. 30 (1887); 52 and 53 Vict., c. 96 (1889); 53 and 54 Vict., c. 69 (1890).

estate of inheritance during the life of the person on whose life the estate is dependent (called the *cestui que vie*). The limitation may be to A during the life of B, or it may be to A and the heirs of his body during the life of B, or to A and his heirs during the life of B. An estate *pur autre vie* may be created in this way: If A be tenant for life of certain lands and convey the lands to B, B will be the tenant for the life of A, because his right to the lands is dependent upon the life of A. Upon A's death, B's estate comes to an end.

But there is a possibility in all such cases that the tenant may die before the determination of his estate. In that event, the ordinary custom would have been to permit it to revert to the creator of the estate of his heirs. At common law, however, the courts held to a rule of permitting the first person who contrived to obtain possession of the land to hold to the end of the term, that is, till the death of the *cestui que vie*. "The 'general occupant,' as this enterprising person was termed, held the land for his own benefit, independent of the claims of the deceased's creditors." To remedy this defect, it was provided by the Statute of Frauds that, in the event of the death of the tenant *pur autre vie* before the expiration of his term, the land should go, until the death of the *cestui que vie*, to the personal representatives of the tenant as assets for payment of debts.[157]

In general, the tenant *pur autre vie*, not holding merely under a lease at a rent, may exercise the statutory powers of a tenant for life under the Settled Land Act.

86. Estates Less Than Freehold.—With respect to magnitude, the estate for years is next in rank to the freehold estates. *Estates for years* were originally not estates at all, so far as any legal recognition was concerned. "Leases for years, or at will, or at sufferance, were originally granted to mere farmers or husbandmen, who, every year, rendered some equivalent in money, provisions, or other rent to the lessors, or landlords. But the latter, in order to encourage them to cultivate the ground, gave them a sort of permanent

[157] Jenks's Modern Land Law, p. 55; Stat. 29, Car. II (Eng.), c. 3, Sec. 3 (1667).

interest for a limited period, founded upon a contract, express or implied, which was not determinable at their will, but which should endure for a time certain. Their possession, nevertheless, was esteemed of so little consequence that they were considered as bailiffs or servants of the lord, * * * who were to receive, and had contracted to account for, the profits at a settled price, rather than as having any property of their own." Subsequently "estates for years seem to have become of importance, and to have been considered, after entry made, as actual interests in the lands vested in the lessee."[158]

87. Estates for Years. — An **estate for years** is one which must expire at a certain period, ascertained at the time of its creation. It is frequently called a *term*, because its duration or continuance is bounded, limited, and determined. The lessee in an estate for years has no possession and therefore no estate until actual entry.[159]

88. Tenancy at Will. — Where the parties to a contract which purports to establish the relation of landlord and tenant stipulate that the relationship may be put to an end at any time by either of the parties, the tenancy is a **tenancy at will.** An estate at will is, therefore, one held at the will of the owner of real property, who is denominated the landlord. In such a tenancy, the landlord is not obliged to give notice to his tenant of his intention to take possession. He need only demand possession. In England, by statute, a tenancy at will is deemed to expire at the end of one year from its creation, unless actually determined before that time.[160]

89. Tenancy by Sufferance. — This tenancy occurs where a man, having occupied land by a lawful title, continues to hold it after his title has expired. He cannot be treated as a trespasser, until a demand of possession has been made, because his entry was lawful; but, in England, if he hold over after demand in writing, he is liable for

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158 1 Washb. R. P., p. 463.

159 2 Black. Comm. 143; see *The Law of Landlord and Tenant.*

160 Act 3 and 4 Wm. IV (Eng.), c. 27 Sec. 7 (1833).

double the value of the lands so long as he keeps possession.[161] In the United States, statutes, in some jurisdictions, require the landlord to give the tenant notice to quit; if he continue to hold over, the landlord may take steps to dispossess him, or he may proceed against him as a trespasser.[162] In other jurisdictions, the landlord may enter upon his lands at any time, but if he use force, he is himself liable as a trespasser.[163]

ESTATES IN FUTURO

90. Reversions. — Estates in futuro, or in expectancy, are those in which there exists a present right or interest, either vested or contingent, the enjoyment of which is postponed to a future time. They comprise *reversions* and *remainders*, or executory interests which are contingent for the commencement of possession upon the time when some precedent estates shall have terminated, as distinguished from those which are limited to take effect on the termination of a precedent estate.

Where the owner of an estate in lands creates out of those lands a smaller estate of freehold, the right to the lands after determination of the inferior estate, or *particular estate*, as it is called, vests by operation of law in the grantor, or creator, of the inferior estate.

ILLUSTRATION. — If A convey land of which he is the absolute owner, to B for life, the property, on the death of B, reverts to A, or, if he be dead, to his heirs. The estate so reverting is called the *reversion*. Where the inferior estate is one that does not carry with it seizin (the right of possession) there is no reversion, for the grantor never parts with the ownership of his land. All estates of freehold which entitle one to possession have the attribute of seizin, a life estate being the least estate to which seizin is incident, and the least estate upon which a reversion can be founded. An estate for years cannot be the basis of a reversion, for the grantor does not lose his right to possession. He merely contracts to permit the tenant to keep it for a certain time.

91. Remainders. — A remainder is an estate created by the act of the parties, limited to begin at the expiration

[161] Stat. 4 Geo. II (Eng.), c. 28, Sec. 1 (1730); Stat. 11, Geo. II (Eng.), c. 19, Sec. 18 (1737).

[162] 17 R. I. 107 (1890); 83 Wis. 267 (1892).

[163] 50 Me. 325 (1862); 31 Me. 293 (1850).

or determination of another estate created by the same instrument.

ILLUSTRATION.—If A, who owns land in fee simple, convey to B for life and on the death of B to C and his heirs, B here takes an estate for life, while C will have the remainder in fee, expectant on the death of B. The estate of B in this case is called the particular estate; that of C is the remainder.

92. In the creation of remainders, certain rules must be observed: *Every remainder must have a particular estate of freehold limited immediately before it, on the determination of which it is to come into possession.*[164] The purpose of this rule is to prevent the estate from being without an owner. Thus, where one attempts to convey an estate to another to commence ten years from the date of the conveyance, it is an attempt to create a freehold in the future and, therefore, void. So the creation of an estate to one person for ten years, at the end of which time the estate is to commence in another person, is an attempt to fill up the gap of ten years, and will not make good the estate which is intended to be vested in the person who is designated to take after the ten years.

No remainder can be limited to take effect after a fee simple absolute.[165] The reason of this rule is, that one who has the fee simple has all the property he can have, and may convey it however and to whomever he pleases; there never can be more than one remainder in fee simple absolute, nor any remainder after that. Thus, if an attempt be made to convey land to a person and his heirs in fee simple, with a remainder to another person and his heirs, the estate in the last person can never vest, because he who conveyed the estate conveyed all he had to the first person in fee simple, who has the absolute title and may dispose of it as he pleases.

93. Remainders are either *vested* or *contingent*. A **vested remainder** is one in which the person to whom the remainder is given has a present right to enjoy the estate in the future. The right is one which he has irrespective of future events,

164 Jenks's Modern Land Law, p. 95.

165 *Ibid.*, p. 97.

and the estate is consequently vested in him at the creation of the estate. The moment that it can be said that the holder of the remainder is entitled to the estate, the remainder is vested. A remainder, therefore, is vested or contingent according to the certainty that the owner may or may not enjoy it.

ILLUSTRATION.—A vested remainder is where there is an estate to A for life, remainder to B in fee. The event on which B's (the remainder man's) estate depends is certain to happen. When A dies, B will receive the estate; or if B die first, his heirs will be entitled to it.

94. A contingent remainder is one limited to take effect to an uncertain person, or upon the happening of an uncertain event. It requires a particular estate to support it, which is also necessary in the case of a vested remainder.[166]

ILLUSTRATIONS.—An estate is granted to A until C returns from Rome, with remainder to B and his heirs. If C do not return from Rome, B and his heirs will not receive the estate; here, the happening of the event has failed.

Where an estate is granted to A for life, with remainder in fee to B's eldest son (then unborn), the remainder is contingent upon the birth of a son to B, an uncertainty. But the instant that a son is born, the remainder is no longer contingent, but vested.[167]

The test by which a vested remainder is distinguished from a contingent remainder is the *possibility* of taking possession of the estate if the possession were to become vacant, and not the *certainty* that the possession will become vacant, before the estate limited in remainder determines.[168]

It is the policy of the law to construe remainders to be vested, and if the instrument of transfer disclose an intention to convey a vested remainder, the courts will follow the intention rather than the actual words of the instrument.[169]

There is no limit to the number of remainders that may be created out of the same estate. "There may be a limitation to A for life, remainder to B for life, remainder to C for life, remainder to D in tail male, remainder to E in tail general, and so on, indefinitely."[170]

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166 2 Black. Comm. 169.
167 *Ibid.*
168 2 Sandf. Ch. (N. Y.) 533 (1845).
169 25 Wend. (N. Y.) 119 (1840).
170 Jenks's Modern Land Law, p. 97.

Remainders form the subject of a very large proportion of the modern problems with reference to real estate. They occur very frequently in family settlements and in wills. In creating remainders, there are several rules of law that must not be infringed under penalty of having the limitation fail.

95. Rule in Shelley's Case.[171]—When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases "the heirs" are words of limitation of the estate, and not words of purchase.[172] This is the rule, or maxim, known as the *rule in Shelley's case*, as originally stated. In less technical language, the rule has been defined as follows: In any instrument, if the freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate; if it be limited to the heir of his body, he takes a fee tail; if to his heirs, a fee simple.[173]

The effect of the rule is to increase the estate of the ancestor from a tenancy for life to a fee tail or fee simple estate. Suppose an estate be granted in a will to A for life with a remainder to his heirs. Under the rule, the remainder to the heirs of A is void, and A, instead of taking a life estate, takes an estate in fee simple. By the expression "the heirs

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[171] The rule was adopted as a part of the common law of this country, and in many of the states still prevails. It has been abolished in most of them. The subject has been exhaustively treated in Pennsylvania, and the numerous decisions will be found analyzed and arranged in tabular form in an essay by J. P. Gross, Esq. (Harrisburg, 1877). The rule has been held applicable to instruments in which the words *heir* or *heirs* (8 W. & S. 38); *issue* (3 W. & S. 160) (30 Pa. 158) (45 *Ibid.* 179); *child* or *children* (7 W. & S. 288) (50 Pa. 483); *son* or *daughter* (3 S. & R. 433) (70 Pa. 335); *next of kin*, *offspring* (36 Pa. 117); *descendants*, and similar expressions are used in the technical sense of the word heirs. Chief Justice Gibson states the operation of the rule as follows: "It operates only on the intention (of the devisor) when it has been ascertained, not on the meaning of the words used to express it. The ascertainment is left to the ordinary rules of construction peculiar to wills . . . It gives the ancestor an estate for life, in the first instance, and, by force of the devise to his heirs, general or special, the inheritance also, by conferring the remainder on him, as the stock from which alone they can inherit;" 13 Pa. 344, 354.—Bouv. Law Dict., Vol. 2 (Rawle's Ed.), p. 991.

[172] 1 Coke (Eng.) 88, 104 (1581).

[173] 1 Pres. Est. 263-419.

are words of limitation and not words of purchase" is meant that the words *the heirs* show what kind of an estate, or how great an estate, A is to take, and not who are the persons entitled. In other words, a limitation to A for life, remainder to his heirs, does not mean that A's heirs are to take; it means the quantity of estate that A is to take. It is obvious that such a construction must defeat the intention of the grantor, but the rule is applied in pursuance of a supposed intention to convey a fee.

96. Rule Against Perpetuities.—Another rule that must not be contravened in the creation of estates by way of remainders, or other executory limitations, is the **rule against perpetuities.** This rule prevents an estate from being given to a person, not yet born, for life, followed by an estate to the child of such a person. The rule itself declares that the vesting of an executory interest shall not be prolonged beyond a life or lives in being, and twenty-one years thereafter.[174]

Such conditions are what are called *restraints on alienation* and are discountenanced by the courts. For this reason the rule exists. If there be a possibility that the estate may not be alienable for a life or lives in being at the creation of the estate, and twenty-one years and nine months thereafter, the proposed disposition of the property will infringe the rule. It is immaterial that the estate *may* be capable of alienation within that period. It is a bad limitation if there be a possibility that it *may not* be alienable within the period prescribed.

97. Executory Devise.—A remainder, as stated, requires a particular estate to support it upon the determination of which the remainder must take effect. Where dispositions are made by will, limitations of this kind are sometimes permitted to avoid the alternative of declaring a man intestate. The limitation must, however, conform to the rule against perpetuities. Such a case would be where land is devised to A for life, and one year after his death to B in

[174] Sm. Ex. Int., Sec. 706.

fee. As a remainder, this limitation must fail, but, as an executory devise, it may take effect. Cases of this kind frequently occur when devises are made to depend on contingencies.

ESTATES UPON CONDITION

98. Definition.—Estates upon condition are such as have a qualification annexed to them by which, upon the happening of a particular event, they may be created, or enlarged, or destroyed. They are (1) *estates upon condition implied* and (2) *estates upon condition expressed.*

99. An **estate upon condition implied** is one in which the condition is not expressed in the deed conveying the estate, but which the law implies as belonging to it. At common law, if a man were given an estate in fee simple, with no condition annexed to it specially, there was a condition impliedly attached to the grant that the tenant would not commit treason; for breach of this condition the estate was forfeited.

100. An **estate upon condition expressed** is one attached to the grant specially at the time of the conveyance, that is, named in the deed, whereby the estate shall either commence, be enlarged, or be defeated upon the happening of an uncertain event; as where an estate is conveyed to a person and his heirs so long as they continue tenants of a certain manor. While this is a fee simple and the largest estate known to the law, yet it may come to an end by the removal of the grantee, or of his heirs, from the manor.

101. Conditions are also *conditions precedent* and *conditions subsequent.* A **condition precedent** is one that must be performed before the estate can vest or commence. Thus a devise as follows: "If my son Thomas become a member of the Presbyterian church, I give him all of my property, real and personal." If Thomas never join the Presbyterian church, he will not receive the property. A **condition subsequent** is one whose effect is to defeat an estate already

vested, as where a devise was made to a man, on the condition that if he should fall into drunkenness and revelry, his estate should cease.[175] Since conditions subsequent tend to defeat estates already vested, they are discouraged by the courts. There are certain circumstances under which conditions become inoperative, that is, breach of them will no longer defeat the estate. This occurs when the condition becomes impossible of performance, when it is contrary to good morals, or when it is inconsistent with the estate granted.[176]

102. Conditions do not generally affect the alienability of estates. They may be freely conveyed, subject to the condition. Certain forms of conditions are of very frequent occurrence in modern conveyances. Houses are conveyed subject to the condition that they shall never be used as places for the sale of intoxicating liquors, or that they shall never be converted into slaughter houses or glue factories. Such conditions are valid and are usually enforced. For breach of condition the grantor has the right of entry. To take advantage of his right to declare a forfeiture he must act promptly and show his intention at once, for it is a right that may be defeated by inaction or acquiescence. Unless this be done the grantee is entitled to hold his estate. Where the condition is not one that demands a continuous performance, after it has once been performed the estate becomes absolute.[177]

103. Conditional Limitation.—In the grant of such an estate conditioned upon the continuance of the grantees as tenants of the manor, if a further estate be granted to another person, in case of the removal of the first-named grantees there will be created an estate called a **conditional limitation.** The grant, in such case, could be of an estate to A and his heirs so long as they shall continue tenants of a certain manor, with remainder to B and his heirs; and upon

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[175] Mitchell, Real Est. and Conv., p. 181.

[176] 41 Pa. 341-349 (1861); 10 Pick. (Mass.) 507 (1830).

[177] See Forfeiture, *infra*.

the removal of A, or his heirs, from the manor, B, or his heirs, would be entitled to the estate.

104. Power to Convey.—It frequently happens that a person who has neither a title to, nor an interest in, lands, has, nevertheless, the power to convey a good title to another person. This power may be conferred by law, by deed, or by will. A sheriff, for instance, may convey a good title to lands in which he never had any interest. Powers are divided into those *relating to land* and those simply *collateral*.

105. A power relating to land is one given to a person who has an interest in the land to dispose of it in a certain way. Thus, A who is tenant for life of the Blackacre estate may be given power to convey it in fee to either of two persons, or to whomever he chooses. Such powers are interpreted liberally, that is, the court will follow the apparent intention of the person creating the power, rather than adhere strictly to the language.

106. A power simply collateral is one given to a person who is not interested in the land; as a power of sale to executors. These powers are construed strictly; the words of the grant are observed literally. There is no particular form of words which must be used in the creation of a power. The governing consideration is the intention. He who creates the power is called the *donor*. It is necessary that any creation of a power to sell lands be in writing. And a power to execute a deed must be by writing under seal.[178]

107. Tenancy in Severalty, Joint Tenancy, and Tenancy in Common.—Estates with respect to the number and connection of their owners, the tenants who occupy and hold them, are such as are held in *severalty*, in *joint tenancy*, and *in common*.

Real property is owned in **severalty** when the owner holds it in his own right only, without any other person being

[178] Mitchell, Real Est. and Conv., p. 506.

joined or connected with him in point of interest during his estate therein. This is the most common and usual way of holding property, and all titles are supposed to be of this sort unless expressly declared to be otherwise.[179]

A **joint tenancy** exists where several persons own property jointly in equal shares, each having the same interest in the whole and every part, with the benefit of survivorship, so long as the tenancy remains. Such persons are tenants who hold individually and jointly, having one and the same interest, secured through one and the same conveyance, commencing at the same time and continuing for the same period, or determinable by the same contingency, and held by one and the same possession.[180]

108. How a Joint Tenancy Is Constituted. — To constitute a joint tenancy, there must be:

1. *Unity of Interest.* — The tenants must have one and the same interest. One joint tenant cannot be entitled to one quantity of estate and the other to a different one; one cannot be tenant for life and the other tenant for years.

2. *Unity of Title.* — The estates of the joint tenants must be created by one and the same act. If the joint estate be created by deed, the estates of all the joint tenants must be granted in that deed.[181]

3. *Unity of Time.* — The estate of the joint tenants must be vested at one and the same period, as well as by one and the same title. Thus, an estate to A and B, or an estate to A for life, remainder to B and C; in the first case, A and B are joint tenants in an estate to be enjoyed at once; in the second case, B and C are joint tenants in a vested remainder in fee so that their title is the same, and their remainder vests at the same period; that is, at the creation of the estate.

4. *Unity of Possession.* — Each of the tenants has the entire possession of the property, as well of every parcel as of the

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[179] 2 Black. Comm. 179.

[180] Washb. R. P., Vol. 1 (5th Ed.), p. 406; 144 Ind. 1 (1895).

[181] 2 Black. Comm. 179, *et seq.*

whole. Each owns an undivided fraction of the whole and not the whole of an undivided fraction.

109. The most distinctive feature of a joint tenancy is the **right of survivorship** by which, upon the death of one joint tenant, there having been no severance of the estate, his entire interest is cast upon the survivor or survivors, to the exclusion of the inheritance of the same by his heirs, and so on, until the titles to all the shares vest at length in the last survivor, who is entitled to the whole estate. A joint tenant, therefore, has no interest which he can dispose of by will, but he can mortgage or convey his interest.[182] The right of survivorship has been abolished in some of the United States, except in the case of joint trustees, and some other special instances.[183]

The right of survivorship will be defeated, if one joint tenant convey his interest to a stranger, or if the estates be severed (that is, separated, so that they no longer present the essential unities) in any other way, as by a lease or the marriage of a female joint tenant. A mortgage by one joint tenant of his interest, also, will destroy the right of survivorship, in so far as the mortgage lien extends, and the survivor will be entitled to the equity of the redemption only.[184]

A joint tenancy can only arise by grant or by purchase, that is, by the act of the parties; it can never arise by operation of law nor by implication. It may be severed by destroying one of the four essential unities. The tenants may agree to make partition of the lands, and hold them in severalty, in which event they will no longer be joint tenants. If one of the joint tenants convey to a third person, this severs the unity of title and destroys the joint estate. When a joint tenancy is destroyed, except by the severance of the unity of possession, a tenancy in common is created.[185]

110. There is a peculiar kind of joint tenancy known as **tenancy by entireties.** It exists only between husband

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[182] 144 Ind. 1 (1895).
[183] Stat. of Pa., March 31, 1812.
[184] 144 Ind. 1 (1895).
[185] 2 Black. Comm. 180-190.

and wife, and its distinguishing feature is that during their joint lives neither can destroy the right of survivorship without the consent of the other party.[186]

111. How Tenancy in Common Is Created.—A **tenancy in common** exists where two or more persons hold possession of property at the same time by several and distinct titles. The quantities of their estates may be different, their proportionate shares may be unequal, and the mode of acquiring these titles may be unlike. The only essential unity between them is that of possession.[187] There is no survivorship between tenants in common. Each owner, in respect of his share of the common property, has all the rights, except that of sole possession, that a tenant in severalty would have.[188]

Tenancy in common may be created either by deed or by destruction of a joint estate. Estates held in common may be dissolved (1) where one tenant acquires the interests of all the remaining tenants, (2) by partition, that is, where the tenants make a division of the property among themselves.[189] Under certain circumstances joint mortgagees are joint tenants. If one of the mortgagees die, the survivors may proceed in their own name and take the necessary steps for foreclosing the mortgage without making the heir or personal representative of the deceased comortgagee a party to the suit. If a mortgage be given to two or more persons to secure their several debts, the mortgagees are tenants in common without the right of survivorship.[190] After the foreclosure of a mortgage, although the debt which it was given to secure may have been a joint one, the mortgagees become tenants in common of the estate, the interest of each being proportionate to his share of the debt.[191]

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[186] 158 Mass. 11 (1893); see *The Law of Husband and Wife.*

[187] 1 Washb. R. P., p. 615.

[188] 2 Black. Comm. 194; Washb. R. P., p. 685.

[189] 2 Black. Comm. 194.

[190] 7 Mass. 131 (1810).

[191] 11 Mass. 469 (1814).

THE LAW OF PROPERTY

(PART 2)

ALIENATION OF INTERESTS IN LAND

1. Incident to the ownership of land is the right to alienate whatever interest one may have therein. Alienation may be effected (1) by operation of law, and (2) by act of the parties. Alienations are *voluntary*, those intended deliberately by the parties to carry out their own arrangements; and *involuntary*, those that take effect independently of the wishes of the parties, or, at least, of one of them.[1]

ALIENATION BY OPERATION OF LAW

2. **Involuntary alienations** (by operation of law) may take place in various ways, as *by inheritance*, *by escheat*, *by forfeiture*, etc.

INHERITANCE

3. The disposition of interests in land, the owner of which has died intestate, that is, leaving no will disposing of it, is governed by the rules of inheritance as established by the common law and the statutes. These rules are based on the natural affections of the human heart and on natural justice, their object being to supply the absence of a last will providing for the distribution of the decedent's estate. They seek, therefore, to conform in every case, as nearly as possible, to the probable current of those affections which would have given direction to the provisions of such will.[2]

All titles to land are acquired either by descent or by purchase. Persons who inherit estates take by descent; estates acquired in any other way are taken by purchase.

[1] Jenks's Modern Land Law, pp. 191, 192. [2] 8 Leigh (Va.) 368-389 (1837).

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4. Definitions.—The word **inheritance,** in its usual acceptation, applies to the descent of real property; but in its popular signification, it includes all the methods by which a person takes property from another at his death, except by devise, and includes *distribution*, as well as descent.[3]

Descent, or hereditary succession, is the title whereby a person on the death of his ancestor acquires his estate as the heir at law; the transmission of an estate by inheritance.[4] In a strict technical sense, the term *descent* is applied to the devolution of real property, and **distribution** and **succession** are terms applied to the devolution of personal property.[5]

An **heir** is he upon whom the law casts the estate immediately upon the death of the ancestor, and an estate so descended on the heir is called an *inheritance.*

The term **ancestor** in law means merely the person from whom the estate passes and not a progenitor as in the popular acceptation. It is sometimes used synonymously with kindred, and embraces all from whom a title by descent can be derived under any circumstances. In statutes, the word is sometimes used as the correlative of heir.[6]

A **descendant** is one who proceeds from the body of another, however remotely. The word is coextensive with *issue*, but does not embrace others not of issue; nor does it extend to *next of kin* or *heirs at law*, for these phrases comprehend persons in the ascending line, and may also include *collaterals.*[7]

A **distributee** is a person who is entitled under the statutes of distribution to the personal property of one who has died intestate.[8]

A person's **kindred,** in the proper signification of the word, means such persons as are related to him by blood. But the term is sometimes used to include a relation in law; it includes collateral as well as lineal relations.[9]

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[3] 33 N. J. Law 387–413 (1867).
[4] 25 Tex. 232–241 (1860).
[5] 33 N. J. Law 413 (1867).
[6] 25 Mich. 185–188 (1872); 19 Ind. 60–62 (1862).
[7] 132 Ill. 287 (1890).
[8] 9 Ired. (N. C.) 279 (1848).
[9] 62 Ga. 144 (1878); 84 Ala. 388.

Consanguinity is the connection, or relation, of persons descended from the same stock or common ancestor. It is either *lineal* or *collateral*. **Lineal consanguinity** is that which subsists between persons, of whom one is descended in a direct line from the other, as between the intestate and his father, grandfather, great grandfather, and so upwards in the direct ascending line; or between the intestate and his son, grandson, great grandson, and so downwards in the direct descending line.[10] **Collateral consanguinity** is that which exists between persons who have descended from the same common ancestor, but not from each other. They spring from the same common root, or stock, but in different branches.[11] The children of brothers are collateral relatives, having different fathers but the same common ancestor (grandfather), and all have a portion of his blood in their veins.

5. All kindred are descendants, ascendants, or collaterals. There are three classes of kindred: (1) One's children and their descendants; (2) his parents and their ascendants; and (3) his collateral relatives, which include (1) the person's brothers and sisters and their descendants, and (2) his uncles, cousins, and relatives, of either sex, who have not descended from a brother or sister of the deceased. The husband or wife of a deceased person is not his or her kindred.[12]

In lineal *direct consanguinity*, every generation constitutes a direct degree, reckoning either upwards or downwards. The father of a person is related to him in the first degree, and so likewise is his son; his grandfather and grandson, in the second degree, and his great grandfather and great grandson, in the third, and so on.[13]

In ascertaining the degree of relationship between collateral kindred, the rule of the civil law has been generally adopted in the United States; which is, to begin with the intestate and ascend from him to the common ancestor, and descend from that ancestor to the next heir, reckoning a degree

10 2 Black. Comm. 202.
11 Bouv. Law Dict.
12 *Ibid.*; 14 Vesey (Eng.) 372 (1807).
13 2 Black. Comm. 203.

from each person, as well in the ascending as the descending lines.[14]

6. A descent may be said to be *mediate* or *immediate* in regard to the mediate or immediate descent of the estate of right; or it may be said to be mediate or immediate in regard to the mediateness or immediateness of the pedigree, or degree of consanguinity. Thus, a descent from a grandfather, who dies in possession, to the grandchild (the father being then dead), or from the uncle to the nephew (the brother being dead), is, in the former sense, in law, an immediate descent, although the one is collateral and the other lineal. On the other hand, with reference to the line of pedigree or consanguinity, a descent is often said to be immediate, when the ancestor from whom the party derives his blood is immediate and without any intervening link or degrees, and mediate when the kindred is derived from him, another ancestor intervening between them. Thus, a descent in lineals, from father to son, is, in this sense, immediate; but a descent from grandfather to grandson (the father being dead), or from uncle to nephew (the brother being dead), is deemed mediate, the father and brother being the mediums of the descent or consanguinity.[15]

No inheritance can vest, nor can any person be the actual complete heir of another, until the ancestor is dead. Before that time the person who is next in the line of succession is called an *heir apparent* or *heir presumptive*. **Heirs apparent** are those whose right of inheritance is indefeasible, provided they outlive the ancestor. **Heirs presumptive** are those who, if the ancestor should die immediately, would in the present circumstances of things be his heirs, but whose right of inheritance may be defeated by the contingency of some nearer heir being born; as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child, or a daughter, whose present hopes may be hereafter cut off by the birth of a son.[16]

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[14] Black. Comm. 207; 4 Kent's Comm. p. 412.

[15] 6 Pet. (U. S.) 112 (1832).

[16] 172 Ill. 524 (1898); 2 Black. Comm. 208.

ENGLISH COMMON-LAW RULES OF DESCENT

7. The **common-law rules** which regulate the devolution of decedents' estates in England have been greatly modified by statute. They are as follows:

1. Inheritance shall lineally descend to the issue of the person who last died actually seised indefinitely; but shall never lineally ascend.

This rule has been abrogated to the extent that the heir must be of the last person entitled to the estate as purchaser. Thus, if a person acquire an estate as the heir of one who purchased it, on his death his heir does not inherit, unless he be also the heir of the purchaser from whom his immediate ancestor acquired it.

2. The male issue shall be admitted before the female.

3. Where there are two or more males in equal degree, the eldest only shall inherit; but the females, all together.

The preference of males to females and the right of primogeniture among the males is still the established rule of descent in England. The right of primogeniture was derived from the martial policy of the feudal system, the eldest son being the first one who became able to perform military service. Females were totally excluded, not only from their inability to perform the feudal engagements, but because they might, by marriage, transfer the possession of their estates to strangers and enemies. The reason which led to the introduction of the law of primogeniture and preference to the males ceased to operate upon the decline and fall of the feudal system, but the practices are now vindicated on the ground that they are essential to the stability of the hereditary orders and are desirable from an economical point of view as favorable to agriculture, wealth, and the prosperity of the nation by preventing the subdivision of landed estates.[17]

4. The lineal descendants, indefinitely, of any deceased person shall represent their ancestors; that is, shall stand in the same place as the person himself would have done had he been living.

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[17] 4 Kent's Comm., p. 383.

Thus, the child, grandchild, or great grandchild (either male or female) of the eldest son succeeds before the younger son, and so on indefinitely; and these representatives shall take neither more nor less, but just so much as their principals would have done. As, if there be two sisters, and one die leaving six daughters, and if the father of the two sisters die without other issue, those six daughters take among them exactly the same as their mother would have done had she been living. This taking by representation is called succession in *stirpes* (according to the roots), since all the branches inherit the same share that the root (or common ancestor) whom they represent would have done. This is still the law in England.[18]

5. On failure of lineal descendants, or issue, of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules.[19]

This rule has been modified so that every lineal ancestor is capable of being the heir to any of his issue. And in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor; so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue. Descent is thus traced from the last purchaser of the property. The person last entitled to the property is considered the purchaser, unless it be proven that he acquired it by inheritance.[20] If there be a total failure of the heirs of the purchaser, or if the land be descendible as if an ancestor had been the purchaser and such ancestor should have no heirs, then the descent is traced from the person last entitled to the property in the same manner as if he had been the purchaser.[21]

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[18] 2 Black. Comm. 217
[19] *Ibid.* 220.
[20] Stat. 3 and 4 Wm. IV, c. 106, Secs. 2, 6, 9 (1833).
[21] Stat. 22 and 23 Vict., c. 35, Sec. 19 (1859).

6. The collateral heir of the person last seised must be his next collateral kinsman of the whole blood.[22] Persons are said to be of the *whole blood* if they have the same father and mother, and of the *half blood* if they have only one parent in common.[23]

This rule has been amended so that any person related to the person from whom the descent is to be traced by the half blood is capable of being his heir. The place in which any such relative by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after his relative in the same degree of the whole blood, and his issue, where the common ancestor is a male, and next after the common ancestor where such common ancestor is a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and his issue, and the brother of the half blood on the part of the mother shall inherit next after the mother.[24]

In all collateral inheritances, the male stocks shall be preferred to the female; that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near, except where the property has, in fact, descended from a female.

In England, the rule is that none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed, and no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed. No female maternal ancestor, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.[25]

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[22] 2 Black. Comm. 224.
[23] 5 Whart. (Pa.) 477 (1840).
[24] Stat. 3 and 4 Wm. IV, c. 106, Sec. 9 (1833).
[25] Stat. 3 and 4 Wm. IV, c. 106, Sec. 7 (1833).

THE INTESTATE LAWS

8. The English common law of descent, in its most essential features, has been universally rejected in the United States, each state having established for itself a law of descent. The statutes of the individual states agree in their main outlines, but differ in some particulars.[26] They are mere arbitrary rules of law prescribing the method by which property shall be distributed upon the death of the owner intestate; and their purpose is to avert the strife and contention which would ensue upon the necessary abandonment of the property, by death of the first holder, among those who might struggle to secure it, or seek to get possession. They are rules established by society, or civil government, for its own peace and tranquillity, and not because any particular person or class of persons possesses any natural right to the succession or inheritance.

No preference is given to males over females, nor does primogeniture among males exist. All the children of the descendant inherit together equally. In some states, however, the eldest child has the right to take the family homestead upon paying to the others their proportionate share of its value.[27]

The rule that inheritance could never lineally ascend has been rejected by all the states except New Jersey, where it is still followed with the modification that the father (and to some extent the mother) of an intestate is allowed to share in the inheritance.[28]

No distinction is made between property that is acquired by purchase and that acquired by descent, unless there exist statutory provisions to that effect. It is not necessary that the first purchaser be ascertained and that his blood relationship be traced to the heir.[29] In some of the states, the statutes direct that ancestral property shall descend to the lineal heirs of the blood of the ancestral purchaser in preference

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[26] See *Appendix:* Analysis of Law of Descent.

[27] 36 N. J. Law 415 (1872).

[28] 32 N. J. Law 182 (1867).

[29] 4 Mas. (U. S.) 467–484 (1827).

to the other kindred, but if there be none of the former class the latter inherit.[30]

9. As a general rule, the property of an intestate descends to his next of kin, the lineal descendants sharing *per capita* (by the head), share and share alike, if they stand in equal degree to the common ancestor; and *per stirpes* (by representation of their parent or ancestor), if they stand in different degrees.[31]

ILLUSTRATION.—Thus, upon the death of a parent leaving two sons, the latter will take his property *per capita* (by the head), share and share alike; that is, it will be divided equally between them. If the surviving descendants be a son and two children of a deceased son, the grandchildren will take *per stirpes;* that is, the son will take one full share, or half, and the remaining half will be divided between the grandchildren.

On the failure of lineal descendants of the decedent, a preference is given to lineal ancestors over the collateral branches. After the parents of the decedent, the ascending line is usually postponed to the brothers and sisters.[32]

None of the states exclude the half blood. Some give preference to the whole blood, and others make no distinction between the whole and the half blood.[33]

All the states have statutes regulating the distribution of the personal property of intestates. In the main, they are founded upon the English statutes but differ in minor details. Usually, the next of kin are named as the successors.[34]

RIGHT TO INHERIT

10. Posthumous Children.—All persons except monsters, which have not the shape of mankind, are capable of transmitting their estates by intestacy and of inheriting from others.[35] In some jurisdictions, a person who has murdered his ancestor for the purpose of acquiring the inheritance is deprived of any interest in the estate.[36]

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30 18 Ohio St. 312 (1868); 2 Peters (U. S.) 58 (1829).
31 2 Harr. (Del.) 103 (1835); 16 Ohio St. 400 (1865); 40 Pa. 115 (1861).
32 20 N. H. 479 (1846); 14 Me. 309 (1837).
33 2 Harr. (Del.) 103 (1835).
34 12 Mass. 490 (1815).
35 2 Black. Comm. 246.
36 115 N. Y. 506 (1889).

The universal rule in England and the United States is that **posthumous children** inherit in all cases in the same manner as if they were born in the lifetime of the intestate and had survived him. Such a child, however, must be born alive and after such a period of fetal existence that its continuance might be reasonably expected.

11. Adopted Children. — The common law made no provision for *adopting* children, but, in most of the United States, laws have been enacted providing for the adoption of children and making them the legal heirs of the adopting parents through the courts.[37] These statutes provide that **adopted children** shall be entitled to all the rights and interests in the estate of such adopted father or mother, by descent or otherwise, that such children would have if they were the natural heirs of the adopted parents. The adopted child has the right of inheritance to the property of the adopting parent only.[38]

When an adopted child dies intestate, his estate vests in his relations by blood, and not in his adopted parents. This is so even when the child has acquired the estate from the adopted parent.[39]

12. Bastards, who are such children as are not born either in lawful wedlock or within a competent time after its determination, are, at common law, incapable of being heirs. They are held to be children of nobody, and have no inheritable blood in them; as they cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. For as collateral kindred consists in being derived from the same common ancestors, a bastard, who has no legal ancestors, can have no collateral kindred, and, consequently, can have no legal heirs but such as claim by lineal descent from himself.[40]

The only exception to this rule in England is when a man has a bastard son and afterwards marries the mother, and

[37] 4 S. W. Rep. 683 (1887).
[38] 47 Ind. 335 (1874).
[39] 35 Ohio 655 (1880).
[40] 2 Black. Comm. 248, 249.

by her has a legitimate son; if the father die and the bastard son enter his land and enjoy it to his death and die seised thereof, whereby the inheritance descends to his issue, in such case, the legitimate son and all other heirs are totally barred of their rights.[41]

In the United States, bastards may inherit and transmit inheritances on the part of the mother in like manner as if they had been lawfully begotten of the mother. Most jurisdictions allow the bastard child to inherit the mother's estates in equal proportions with the legitimate children, but, in a few of the states, he is considered his mother's heir only in the event of there being no legitimate children.[42]

In the case where the illegitimate children are given the right by statute to inherit from their mother and the mother from the illegitimate children, it does not necessarily follow that the illegitimate children of the same mother have other capacity to take and inherit from one another.[43] But, in some states, this privilege is accorded the illegitimate children.[44]

In some states, illegitimate children may inherit from their father, if he recognized them as his children, but this recognition does not make them legitimate; it merely gives them the quality of inheritors.[45]

The legislative power to legitimate a bastard child has long been recognized both in England and in the United States. This legitimation may be accomplished by either general or special laws. Many of the states have statutes to the effect that a valid subsequent marriage of the parents of the bastards will legitimate the bastards.[46]

ESCHEAT

13. Escheat, in the United States, is a reversion of lands to the state; in England, to the crown. At common law, escheat means an obstruction of the course of descent by some unforseen contingency, whereupon the land held by

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41 2 Black. Comm. 248.
42 5 Wheat. (U. S.) 260 (1820); 3 Md. Ch. 230 (1849).
43 86 Pa. 219 (1878).
44 5 Biss. (U. S.) 166 (1870).
45 3 Kans. 51 (1864).
46 77 Pa. 84 (1874); 3 Hen. & M. (Va.) 225 (1808).

a tenant under the feudal system reverts to the original grantor, his descendants, and successors.[47]

The English law of escheats was founded upon the principle that the blood of the person last seised of the property was, by some means or other, utterly extinct and gone; and, since none could inherit his estate but those who were of his blood and consanguinity, it followed that when such blood was extinct, the inheritance itself must fail.[48] As feudal tenures do not exist in the United States, there are no private persons who succeed to the inheritance by escheat, and the state, as occupying the place of the feudal lord, steps in as the original and ultimate proprietor of all the lands within the jurisdiction.[49] In Canada, the respective provinces, and not the dominion government, are entitled to property which has escheated.[50]

The nature of the title by which the sovereign power succeeds to escheated property is viewed in different lights in various jurisdictions. In England, the king acquires the estate as proprietor and not as sovereign. In some of the United States, when an escheat has taken place, the property is said to have returned to the common stock to which the whole community is entitled. Other jurisdictions consider the state a statutory heir, but the majority of the states hold that the state is entitled to succeed to the escheated property by virtue of its eminent right of sovereignty.[51]

In nearly all the states, statutes provide that property which is acquired under escheat proceedings shall be administered for the benefit of the community in which the intestate dies.[52] In some jurisdictions, the public schools are the recipients of the property, and in others, *various* educational institutions are the recipients.[53]

14. At common law, only real property is escheated; but by statute, in the United States, real and personal

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47 Stand. Dict.; 2 Black. Comm. 244; 41 Tex. 10–17 (1874).

48 2 Black. Comm. 245.

49 4 Kent's Comm., p. 424.

50 L. R. 8 App. (Eng.) 767 (1883).

51 4 Kent's Comm., p. 424; 44 Pa. 492 (1863); 23 La. Ann. 69 (1871).

52 107 N. Y. 185–196 (1887).

53 5 Neb. 203 (1876); 90 N. C. 385 (1884).

property are put on the same footing, and both are subject to escheat.[54]

In England, if real property be held in trust and the beneficiary die without heirs, the property does not escheat to the crown, but the trustee, if alive and in possession of the estate, takes it, discharged of the trust, as his own. This rule, however, does not apply to leaseholds and other species of personal property.[55]

In the United States, the English doctrine is not followed. When the beneficiary dies without heirs, the state stands in his place and is clothed with all the interest which he had. The rights of the trustee, who is considered a mere instrument for carrying out the wishes of the creator of the trust, are treated with no respect, and the state deals with the property as its own.[56]

The right of the state to acquire property under escheat proceedings cannot be prevented by the creation of a secret trust disposing of the property. The interest in such a trust belongs to the state and may be enforced in its favor and for its benefit in a court of equity.[57]

Formerly, in England, if a trustee died without heirs, the trust estate escheated to the king, freed from the trust. But this rule has since been amended so that another trustee may be appointed in the place of the decedent to carry out the trust. In the United States, trust estates are never allowed to fail for want of a trustee, and all escheated lands, when held by the state or its grantee, are subject to the same trusts, encumbrances, charges, and rents, as if they had not escheated.[58]

15. At common law, escheats were of two kinds, those occurring through failure of issue, and those happening through fault of the tenant, as corruption of blood. Inheritable blood was said to be wanting when a person died

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[54] T. U. P. Charlt. (Ga.) 97 (1807); 107 N. Y. 185 (1887).
[55] 4 Kent's Comm., p. 424.
[56] 10 Gill & J. (Md.) 452 (1839).
[57] 5 Paige (N. Y.) 114 (1835).
[58] 4 Kent's Comm., p. 425, 426; 1 Sandf. Ch. (N. Y.) 139 (1843).

without any relations on the part of any of his ancestors, or any relations on the part of those ancestors from whom the estate descended, or any relations of the whole blood.[59]

By the attainder for treason or other felony the blood of the person attainted was held to be so corrupted as to be no longer inheritable. The tenant was entitled to his estate only while he conducted himself properly, and, upon proof of his guilt, the covenant between him and the lord was considered broken, the property reverted from the offender to the lord, and the inheritable quality of the tenant's blood was forever extinguished; but escheat for attainder is abolished in England, and instead of escheating to the king, the property of a convict is now entrusted to an administrator during the term of his punishment.[60]

In the United States, the principal ground for escheat is the failure of heirs of the decedent. For an escheat to occur, however, it is necessary that the intestate should have been possessed of the property at his death.[61]

In those states where the common-law disabilities have not been removed, bastards are still incapable of receiving or transmitting property. Accordingly, if a bastard die intestate his property escheats to the state. The majority of the states have enacted statutes legitimating bastards and abolishing illegitimacy as a ground of escheat.[62]

The common-law disabilities of aliens to inherit and transmit their property exist in the United States. Where a person dies intestate leaving issue, who are aliens, the latter are not entitled to succeed to his property, and if there be no other heirs capable of inheriting, the property escheats to the state. And the property of an alien, who dies intestate *without heirs* capable of succeeding to it, immediately vests in the state.[63]

The constitution of the United States inhibits a forfeiture

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[59] 2 Black. Comm. 245, 246.
[60] 2 *Ibid.*, 251, 252.
[61] 60 Fed. Rep. 220 (1894); 5 Rawle (Pa.) 111 (1835).
[62] 6 Blackf. (Ind.) 533 (1843).
[63] 4 Wheat. (U. S.) 453 (1819); 1 Washb. R. P. (5th Ed.), p. 79; 7 Wheat. (U. S.) 535 (1822); 1 B. Mon. (Ky.) 141 (1840).

for corruption of blood by conviction or attainder. Escheats on account of corruption of blood are consequently abolished in all the states.[64]

FORFEITURE

16. Forfeiture is a punishment annexed by ancient law to some illegal act, or negligence, in the owner of real property, whereby he loses all his interest therein, and it goes to the party injured, as a recompense for the wrong which either he alone, or the public together with him, has sustained.[65]

"Forfeiture differs from escheat, in that it takes place independently of the failure (actual or fictitious) of the heirs of the tenant, and, in some cases, independently of the claims of the reversioners. Since the abolition of forfeiture for excessive feoffments, treason, and felony, and its virtual abandonment in cases of outlawry, claims to forfeiture of lands, other than for breach of express condition, have become somewhat rare." In England, there still exist several instances in which forfeitures may arise. The only important one is that of forfeiture for breach of express condition.[66]

In order to recover possession of property so forfeited, it is usual to bring an action in the nature of ejectment; that is, an action to eject the tenant or holder from the property. Conditions most frequently arise in leases or agreements between the lessor and lessee, and are principally conditions subsequent, provided for in the usual clauses of reentry in case of a breach of a particular, or any, covenant in the lease, as non-payment of rent, not repairing, not insuring, not residing on the premises, and the like.[67]

17. Occupation is the taking possession of those things which before belonged to nobody; this is the true ground and foundation of all property or of giving to individuals the right to own those things which, by the law of nature,

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[64] Const. U. S., Art. III., Sec. 3, Cl. 2; T. U. P. Charlt. (Ga.) 97 (1807).

[65] 2 Black. Comm. 267.

[66] Jenks's Modern Land Law, pp. 216, 217; see Estates Upon Condition *supra*.

[67] See *The Law of Landlord and Tenant*.

unqualified by that of society, were common to all mankind. When once it was agreed that every thing capable of ownership should have an owner, natural reason suggested that he who could first declare his intention of appropriating anything to his own use, and, in consequence of such intention, actually took it into possession, should thereby gain the absolute property in it.[68]

Virtually, there is but one case in which title to real property can be acquired by occupation; that is, by *alluvion*, where land is formed either by the receding of the sea, or by the deposit of soil from the bed of a river or other stream. But no change of ownership is effected by a river's suddenly changing its course.

A *negative title by occupancy* may be acquired by occupancy under the statute of limitations. Where the owner of property which another is occupying or enjoying fails to assert his rights, that is, to bring an action for recovery of his property for a certain number of years, by the statute of limitations the owner loses his right to bring the action. The effect is to deprive the owner of the property which was formerly his, while, at the same time, it does not make the one in possession the owner of it; hence the title of the occupier is a negative one.

STATUTES OF LIMITATIONS

18. By *limitation* is meant the period of time prescribed by the law during which a title may be acquired to property by virtue of a simple adverse possession and enjoyment; or the time at the end of which no action at law or suit in equity can be maintained. The statutes fixing such period are called the **statutes of limitations.**[69]

At common law, one who had a right of action of any kind could not lose it by lapse of time. He might bring his suit twenty, thirty, or forty years after his cause of action occurred. In the reign of James I, a statute was passed entitled a "Statute for the Limitation of Actions and for Avoiding Suits at Law,"

[68] 2 Black. Comm. 258.

[69] Ang. Lim., quoted in 115 U. S., 620-622 (1882).

upon which all subsequent statutes of limitations in England and in the United States have been founded. It was adopted by the states while they were yet colonies, the only substantial difference being in the time named within which the action must be brought. This is still true, and it is held that even where different words are used in the act, the meaning is to be considered the same as that of the act of James I, unless some different intention be expressly shown. The time prescribed in the different statutes differs not only from that prescribed in the English statute, but it differs considerably in the various statutes themselves; in some states, the time is six years for real actions; in others, twenty.[70]

The policy of these statutes is to encourage promptitude in the prosecution of remedies. They prescribe what is supposed to be a reasonable period for this purpose. The statutes confer no right of action; they are enacted to restrict the period within which the right, otherwise unlimited, may be asserted. They are founded upon the general experience of mankind, that valid claims are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates a presumption against its original validity, or that it has ceased to subsist. This presumption is made, by these statutes, a positive bar, and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence—from death of some witnesses and the imperfect recollection of others, or the destruction of documents—it might be impossible to establish the truth.[71]

When for years no claim to property is made against an adverse possessor, the presumption arises that his possession is founded in right, and he acquires title by operation of the statute.

19. In their terms, statutes of limitations apply only to legal remedies. They have no direct application to

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[70] Stat. 21 Jas. I, c. 16 (1624); Ang. Lim. (6th Ed.), Sec. 15-24; 2 Minor's Institute, Vol. IV, Pt. 1 (2d Ed.), p. 542; 21 Wend. (N. Y.) 640 (1839).

[71] 7 Wall. (U. S.) 386-390 (1868).

proceedings in equity, even when the latter are concurrent with the remedy at law. Courts of equity, however, allow the statute to be pleaded in such a case for the reason that a person should not be permitted to evade its effects by resorting to another branch of the law.[72]

The defense which the statute of limitations puts forth is not to seek avoidance of just claims and demands admitted to be due, but to encounter in the only practicable manner such as are ancient and unacknowledged. It does not impair the remedy, but only requires its application within the time specified.[73]

In actions based upon a promise, a new promise to pay, or an acknowledgment of the indebtedness, will start the statute of limitations anew. This does not apply to torts (wrongs).[74] A partial payment of a debt revives the liability. It is deemed a recognition of it and an assumption anew of the balance.[75] A payment of interest is also regarded as an acknowledgment of the debt, and from the acknowledgment a promise to pay the debt may and ought to be implied.[76] A payment entered upon a written evidence of debt by the debtor, either in his own handwriting or by some one authorized by him, is equivalent to a new promise to pay and removes the bar of the statute.[77]

The promise and acknowledgment must be made to the creditor or his agent. An unqualified acknowledgment to a stranger will not take a case out of the statute.[78] If, however, the acknowledgment be to a stranger and it appear that it was the intention that it should be communicated to and influence the creditor, it is just as effectual to defeat the statute of limitations as if it had been made directly to the creditor.[79] To make payments effective against a party to save a claim from the operation of the statute, they must have been made by him, or for him, by his authorized agent.[80]

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[72] 4 Hill (N. Y.) 71 (1843).
[73] 5 Mas. (U. S.) 505-525 (1830); 96 U. S. 595-603 (1877).
[74] 20 Johns. (N. Y.) 277 (1822).
[75] 82 N. C. 234 (1880).
[76] 37 Ch. Div. (Eng.) 651-657 (1888).
[77] 18 Fed. Rep. 280 (1883).
[78] 64 Cal. 354 (1883).
[79] 98 N. Y. 221 (1885).
[80] 89 N. Y. 456-460 (1882).

20. Unless there be an express saving in the statute, no person will come within its exceptions, and the limitations will operate against persons under disability as well as against others.[81] A party who is entitled to interpose the statute of limitations may waive the right. The law does not compel him to resort to this defense, nor can others insist upon it for him. An agreement not to plead the statute of limitations is binding, if founded upon a good consideration.[82] If the defendant in a suit, by his own misrepresentation, has induced a plaintiff to delay bringing suit until recovery is barred by the statute of limitations, he cannot avail himself of this defense.[83]

Statutes of limitation affecting existing rights are not unconstitutional as being an impairment of the obligation of contracts, if a reasonable time be given for the commencement of an action before the bar takes effect. The parties to a contract have no more vested interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action, than they have in the form of the action to be commenced; and the legislature may change the forms of an action, or modes of remedy, at its discretion, provided adequate means of enforcing the right remain.[84]

21. A claim that has become unenforceable by reason of lapse of the period fixed by the statute of limitations for the bringing of actions is popularly said to be *outlawed*. When this time begins to elapse, the statute, it is said, *begins to run;* that is, from that moment, the time counts against the holder of the right of action. The lapse of the time is called the *running of the statute*.

Statutes of limitation do not begin to run until the cause of action is complete. In criminal proceedings, the time is calculated from the commission or consummation of the crime. When the statute once begins to run, nothing will

81 26 W. Va. 629-635 (1885).
82 76 Ind. 195 (1881); 17 Pa. 238-245 (1851).
83 90 N. C. 542 (1884).
84 95 U. S. 628-632, 33 (1877); Const. U. S., Art. I, Sec. 10, Cl. 1.

interrupt it except a disability that existed when the cause of action arose. A subsequent disability cannot affect it.[85]

In cases where the possibility of resorting to the courts has been taken away, as in time of war, the statute will not run, though there be no such provision in the statute. The running of the statute is postponed, also, by infancy, absence of one of the parties, coverture, insanity, imprisonment, and pendency of legal proceedings.[86]

PRESCRIPTION

22. By the long and undisturbed possession of incorporeal real property, a person may acquire a title to it, or a right of ownership, superior in law to that of another who may be able to prove an antecedent, and at one time greater, title. This superior title has been lost by the negligence of the person holding it in failing, within a reasonable time, to assert it effectively, as by resuming the possession to which he was entitled, or asserting his right by suit in the proper court.[87]

Originally, by the English law, the term of possession necessary to create a right by prescription was for a time beyond the memory of man. The time was afterwards changed by statute to twenty years.[88] In the United States, the period of prescription varies; in some states, the English rule is followed, and in others, the period of prescription is twenty-one years.[89]

In order to acquire rights by prescription, the possession must be for the proper period and should be open, peaceable, continued, exclusive, and unequivocal. It must, also, be adverse, under a claim of right, and not by permission, and must be with the knowledge and acquiescence of the true owner.[90]

Prescriptive rights may be lost by the destruction of the

[85] 32 Fed. Rep. 534-537 (1887); 110 U. S. 621 (1883).

[86] 10 Wall. (U. S.) 218-223 (1869).

[87] 115 U. S. 620 (1885); 37 Pa. 427 (1860); see Easements *supra*.

[88] 1 Co. Litt. 11 *a*; 10 Allen (Mass.) 566 (1865).

[89] 29 Pa. 22 (1857).

[90] 27 Tex. 304 (1863); 34 Iowa 148 (1871); 8 Gray (Mass.) 443 (1857).

subject-matter in which they are exercised, or by a failure to claim them. Unity of title and possession of the subject-matter will also extinguish the rights.[91]

ESTOPPEL

23. Estoppel is the stopping, or preclusion, of a person from asserting a fact or claim, irrespective of its truth, by reason of a previous representation, act, or adjudication inconsistent therewith.[92]

When a fact has been admitted or asserted for the purpose of influencing the conduct of, or deriving a benefit from, another, so that it cannot be denied without a breach of good faith, the law *precludes* the party from repudiating his representations or denying the truth of his admissions.[93]

Formerly, the questions regarding estoppel arose almost entirely in relation to transfers of real property. In more modern times the principle has come to be applied to all cases where one, by words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position.[94]

Estoppels are by (1) *matter of record;* (2) *deed;* and (3) *conduct in pais,* commonly called *equitable estoppel.*

24. Estoppel by Matter of Record.—Estoppel by matter of record arises from the adjudication of a competent court, the record of which imports such absolute verity that it admits of no averment, plea, or proof to the contrary.[95]

In the matter of a judgment rendered by a court, for instance, it is the established doctrine that if the court in which the proceedings took place had jurisdiction to render the judgment, no error in its proceedings which did not affect the jurisdiction will render the proceedings void; nor can errors be considered when the judgment is brought

91 62 Pa. 274 (1869).
92 Cent. Dict.
93 5 Ohio 199 (1831).
94 5 Exch. (Eng.) 959 (1850); 28 Me. 525 (1848); Co. Litt. 352 *a*.
95 99 Mass. 200-203 (1868); Co. Litt. 230.

collaterally into question; and the estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or the groundwork upon which it must have been founded.[96]

Estoppel does not operate to interfere with the right of a court to vacate a judgment rendered by it. Ordinarily, such a vacation cannot be made after the expiration of the term at which it was rendered, except where the judgment is void for any reason, or procured by fraud, or where it appears that the rendering of the judgment was not intended, or where the court had no jurisdiction in the matter.[97]

Legislative records which are regular upon their face are conclusive evidence of the authenticity of their passage and contents, and extrinsic evidence cannot be introduced to contradict them.[98] Parties are not estopped from denying any facts which may be recited in public acts, but a respect for a coordinate department of the government requires the court to treat them as true until the contrary appears.[99]

25. Estoppel by Deed.—**Estoppel by deed** is such as arises from the provisions of a writing conveying property. The general rule is that a party to a deed is precluded from denying anything stated therein which has operated upon the other party.[100]

A writing not under seal will not give rise to an estoppel, except in those jurisdictions where the common-law rule has been modified by statute and seals are dispensed with in the conveyance of real property.[101]

The making of a deed, or writing, sealed and delivered, is a solemn act which the maker may not dispute. If the deed be invalid, estoppel cannot operate to make it binding. Therefore, to create an estoppel, the deed must be good and valid in its form and execution.[102]

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[96] 9 Wall. (U. S.) 23-30 (1869); 1 Pet. (U. S.) 328, 340 (1828)

[97] 51 Conn. 387 (1883); 24 Ill. 295 (1860); 52 Ala. 55 (1875).

[98] 32 N. J. Law 29-40 (1866); 30 Cal. 253 (1866); 3 Black. Comm. 331.

[99] 11 Ga. 459-520 (1852).

[100] 7 Conn. 214 (1828); see Private Grants, Deeds, in this title, *infra*.

[101] 61 Ala. 518 (1878).

[102] 38 Ind. 512 (1872); 39 Minn. 511 (1888).

When a person makes a deed of land to which he has either no title or a defective one, and, subsequently, acquires a good title, his new acquisition inures to the benefit of his grantee on the principle of estoppel. The same is true of sales of personal property in the United States. In England, the question is not settled, but it is doubted if the rule extends so far.[103]

26. The obligation created by estoppel binds not only the party making it, but all persons privy to him—those who stand in the mutual or successive relationship to the same rights of property. The legal representatives of the party, those who stand in his place by act of law, and all who take his estate by contract, stand in his stead and are subject to all the consequences which accrue to him. The estoppel adheres to the property and is transmitted with it, and all who afterward acquire title to it take it subject to this burden.[104] A stranger to a deed cannot be bound by an estoppel, nor can he take advantage of it.[105]

Estoppel does not prevent the grantor from reacquiring title from his grantee by purchase or adverse possession. If the grantee, by laches or otherwise, has lost his right to enforce specific performance, the grantor will not be estopped from maintaining a title acquired by him subsequent to that time.[106]

A grantor is estopped from setting up an after-acquired title as against any person who has succeeded to the title of the grantee, although the person has acquired the property in some other way than by deed. For instance, such grantor is estopped as against the heirs of the grantee, or a purchaser at sheriff's sale on an execution against the grantee. He is estopped as against every person holding under, or in privy with, his grantee.[107]

A deed of personal property is binding on the grantor, and

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103 9 Wall. (U. S.) 617-625 (1869); 21 Wall. (U. S.) 205 (1874).

104 5 Ohio 198 (1831).

105 10 Ohio St. 64 (1859), citing 3 Metc. (Mass.) 42.

106 109 Ala. 413, 414 (1895); see Laches, in this title, *infra*.

107 12 Kans. 467-473 (1874).

he is estopped from denying that he has transferred the property, although there has been no delivery of it.[108]

In the case of a deed poll (one executed by one party, such as a sheriff, executor, or trustee), no estoppel can operate against the grantee, for he does not join in the instrument nor is his seal annexed to it. Neither is he estopped from denying the title of his grantor.[109]

27. Estoppel by Conduct in Pais.—Estoppel by conduct in pais, or **equitable estoppel,** results from conduct or words under circumstances rendering it inequitable to allow the party to withdraw from the position taken; as, where the claimant of a property has stood by and allowed it to be sold as the property of another without objection, the law holds him estopped from reclaiming it from the buyer.[110]

The rule of equitable estoppel is based on the acts, representations, or silence of a party. Where a person is silent when it is his duty to speak, where he tacitly admits something upon which another party is led into a transaction in good faith, that person may not, to the prejudice of the party so misled, impeach the transaction.[111]

Fraud is the basis of equitable estoppel. It is not essential that there should have been an intention to deceive, but there must have been a confidence reposed which would be betrayed to the injury of one party, if the other be permitted to restrict his admission or denial.[112]

28. Such estoppel must have the following requisites: (1) There must have been a false representation or a concealment of material facts; (2) the representation must have been made with knowledge of the facts; (3) the party to whom it was made must have been ignorant of the truth of the matter: (4) it must have been made with the intention that the other party should act upon it; and (5) the other party must have been induced to act upon it to his disadvantage.[113]

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108 56 N. J. Eq. 199 (1898).

109 109 U. S. 608 (1883); see Private Grants, Deeds, in this title, *infra*.

110 102 U. S. 68 (1880).

111 42 N. Y. 447, 448 (1870); 99 Mass. 202 (1868).

112 42 N. Y. 448 (1870).

113 97 Mo. 273 (1888); 67 Ill. 437 (1873).

An estoppel from the representations of a party can seldom arise except where the representation relates to a matter of fact, to a present or past state of things. If it relate to something to be afterwards brought into existence, it will amount only to a declaration of intention or opinion liable to modification upon a change of circumstances of which neither party can have any certain knowledge.[114]

If both parties be equally cognizant of the facts and one has acted under a mistaken idea of the law, the other party cannot say he has been deceived thereby and is entitled to an application of the doctrine of estoppel, but he will be considered as having acted upon his own judgment solely.[115]

Mere negligence is sufficient to cause an estoppel, if the act is calculated to mislead, and actually does mislead, the party acting on it in good faith and with reasonable care and diligence.[116]

Where a contract is void as being against public policy or some legislative enactment, the rule of estoppel will not make it effectual merely because one person has acted upon it, unless the contract were induced by concealing certain facts and making false statements.[117]

There is a distinction between *waiver* and *equitable estoppel*. **Waiver** is used to designate the act, or the consequence of an act, of one party only, while **equitable estoppel** is applicable where the conduct of one party has induced the other party to take such a position that he will be injured, if the first be permitted to repudiate his acts.[118]

LACHES

29. The enforcement of a right may be barred by *laches*, which, technically in law, means inexcusable delay in asserting a right. The rule is an application of the maxim, "the laws serve the vigilant, not those who sleep."[119]

Laches is the neglect to do that which by law a man is obliged or in duty bound to do. Such neglect warrants the

114 96 U. S. 544-547 (1877).
115 151 Ill. 294-300 (1894).
116 30 N. Y. 226-230 (1864).
117 137 Ill. 497 (1891); 7 App. Cas. (D. C.) 116 (1895).
118 86 Cal. 260-262 (1890).
119 Am. & Eng. Encyc. of Law (1st Ed.), Vol. 12, p. 534.

presumption in a court of equity that the person has abandoned his claim, or declines to assert his right, and it operates as a bar to his right.[120]

A person who is open to the charge of laches is said to be inexcusable, negligent, and inattentive to his interests. Neglect has always been discountenanced in a court of equity, and from the beginning of equity jurisdiction there has always been a limitation to suits in the equity courts, which will not lend its aid to any one who sleeps upon his rights. The courts of equity permit lapse of time to defeat an acknowledged right only on the ground of its affording evidence of a presumption that such right has been abandoned. It never prevails when such a circumstance is outweighed by opposing facts and circumstances.[121]

The question of laches depends upon whether, under all the circumstances, a party is chargeable with want of due diligence in not instituting the proceedings sooner; whether there be laches, is a question of fact upon the evidence—an equitable defense determinable by the particular facts and circumstances of each case. In some cases, a comparatively short period will bar the claim, while in others, a greater length of time will not have that effect. The lapse of time is not, like the statute of limitations, any determined number of days or years, applicable to every case.[122]

30. The degree of diligence required in prosecuting claims depends upon the nature of the rights underlying the suit. Persons claiming rights or interests in property of a speculating or fluctuating value are chargeable with a far higher degree of diligence in the assertion of those rights, than where the property is of a fixed value and changing but little.[123] No laches can rise from delay in bringing suit until after a person has knowledge of the facts affecting his rights; but ignorance of the facts must not be the result of

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[120] Bouv. Law Dict., Vol. 2, p. 101; 30 Fla. 612 (1892); 80 Va. 22-30 (1885).

[121] 16 N. J. Eq. 240 (1863); 4 Munf. (Va.) 332 (1813).

[122] 160 U. S. 171 (1895); 90 Mo. 239 (1886); 91 U. S. 591 (1875).

[123] 24 Fed. Rep. 869 (1883).

negligence. If, by reasonable diligence, the facts could have been discovered or ought to have been known, a person will be deemed guilty of laches; ignorance of the law will not excuse a person from laches.[124]

Mere unavoidable delay, which can be, and is, satisfactorily explained, does not amount to laches, but every suitor in an equity court must show, by both averment and proof, some sufficient excuse to justify delay.[125] Laches in the assertion or prosecution of a claim is not always enough to defeat it. The laches must be such as to afford a reasonable presumption of the satisfaction or abandonment of the claim; or such as to prevent a proper defense by reason of the death of parties, loss of evidence, or otherwise.[126]

If the positions of the parties have not been changed to the injury of the defendant, delay is immaterial. No person is prevented from averring the truth or asserting a just demand, unless by so doing it would work an injury to a person who has been induced to do something, or abstain from doing something, on account of what another has said or done, or omitted to say or do.[127]

The disabilities which will exempt a person from the imputation of laches are practically the same as those which prevent the statutes of limitations from running. If the obligation be of a continuing nature, laches cannot be charged to the plaintiff until there has been a breach of it; and where the wrong complained of is continuing and tainted with fraud, mere lapse of time will not prevent redress from being obtained.[128]

As in estoppel, the heirs and personal representatives are bound by laches which affects the person through whom they claim.[129] So, a grantee is affected by the laches of his grantor.[130]

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124 101 Ill. 242-272 (1882); 14 Ore. 541 (1887); 18 Mich. 27 (1869).

125 76 Md. 54 (1892); Am. & Eng. Encyc. of Law (2d Ed.), Vol. 18, p. 100.

126 13 Gratt. (Va.) 354-362 (1856).

127 136 Mass. 273 (1884); 8 Ch. Div. (Eng.) 817 (1878).

128 15 Atl. Rep. 800 (1888); 20 Mo. App. 99 (1885).

129 8 L. T. N. S. (Eng.) 267 (1863).

130 3 D. F. & J. (Eng.) 535 (1861).

The government, in its character of sovereign, cannot be charged with laches;[131] this exemption does not apply where the government is engaged in business transactions.[132]

ACQUIESCENCE

31. Acquiescence, in legal language, is consent inferred from silence, or from omission to dissent when circumstances require an expression of dissent.[133] The distinction between *laches* and *acquiescence* is, that the former is neglect to do what ought to have been done, and the latter is the resting satisfied with, or submission to, an existing state of things. Laches together with other facts may be evidence of acquiescence, and acquiescence may be evidence of consent.

The distinction in their import is important. Laches imports a merely passive, while acquiescence implies active, assent; and while, when there is no statutory limitation applicable to the case, courts of equity would discourage laches and refuse relief after great and unexplained delay, yet, when there is such a statutory limitation applicable to the case, they will not anticipate it, as they may when acquiescence has existed.[134]

Under circumstances from which assent may be reasonably inferred, *acquiescence* is *quiescence*, and is no more than equitable estoppel. If a party having a right stands by and sees another dealing with his property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain.[135]

ABANDONMENT

32. Property, both in land and movables, remains in the owner thereof, unless he should die or make a transfer, until he does some act which shows his intention to abandon it—for it then becomes of public right and is liable to be appropriated by another.

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131 130 U. S. 263 (1888).
132 91 U. S. 389 (1875).
133 Stand. Dict.
134 69 Cal. 255–269 (1866).
135 8 Ch. Div. (Eng.) 286–314 (1878); 2 Phill. Ch. (Eng.) 117–123 (1846).

So, if one be possessed of a jewel, and cast it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use. But if he hide it privately in the earth, or other secret place, and it be discovered, the finder acquires no property therein; for the owner has not by such act declared any intention to abandon it, but rather the contrary; and if he lose it or drop it by accident, this is not an abandonment, and, therefore, in such a case, the property still remains in the loser, who may claim it again of the finder.[136]

There may be an abandonment of both real and personal property. Where there has been an abandonment of real property, the next taker of the land does not immediately acquire a perfect title thereto, nor does the former owner at once lose all his right in the premises. To accomplish a complete transfer of the title in this manner, a certain length of time must elapse during which the occupant enjoys an open, notorious, peaceable, continuous, and adverse possession of the premises. But, in case of an abandonment of personal property, no lapse of time is required to perfect the title of the finder; the mere act of abandonment by the former owner is sufficient.

Movables found upon the surface of the earth, or in the sea, and unclaimed by any owner, are supposed to be abandoned by the last proprietor, and belong to the first occupant or finder; but, it is requisite that the former owner should have completely relinquished the chattel before a perfect title will accrue to the finder.[137]

BANKRUPTCY AND DEBT

33. Alienation of property takes place frequently in accordance with statutes which deprive one man of his property and give it to another. Such is the effect of bankruptcy acts. Upon insolvency, a person is obliged to yield up his property, to satisfy, so far as possible, the claims

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136 2 Black. Comm. 9.

137 *Ibid.*, 402; 2 Kent's Comm. p. 356.

of his creditors. Similarly, in the case of a simple debt, the creditor may obtain a judgment and execution against the property of his debtor and have it sold.[138]

ALIENATION BY ACT OF PARTIES

34. The power to freely convey and transfer real property is not one that is naturally incident to property in land; it is an incident attached to the ownership of land as the combined effect of three English statutes.[139]

Alienations have been classified as voluntary and involuntary, or those effected by act of the parties and those which take place by operation of law. Specifically, **voluntary alienation** is the act whereby one person transfers the property and possession of lands, tenements, or other things, to another. In a sense, all alienations are *acts of the law* and also *acts of the parties;* for no alienation can be effectual if the law does not sanction it, and it is hardly possible to conceive a case of alienation in which some act of the parties is not required to set the law in motion. But the two classes can clearly and usefully be distinguished.[140]

Unquestionably, voluntary alienations are, in practice, the more important; they comprehend, likewise, the most difficult subjects of real-estate law. In dealing with involuntary alienations first, therefore, the way is paved for the intricate topics of voluntary alienations, such as mortgages and deeds. The rules which govern the transfer of property by one man to another comprise the laws of conveyancing.

COMMON-LAW CONVEYANCES

35. **Common-law conveyances** are *original*, or *primary;* and *derivative*, or *secondary*. An **original, or primary, conveyance** is one by which an estate is created or transferred to a person who before had none; a **derivative,**

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[138] See *The Law of Debtor and Creditor.*

[139] Stat. 18 Edw. I (Eng.), c. 1 (*Quia Emptores*) (1290); Stat. 32, Henry VIII, c. 1 (Stat. of Wills) (1541); Stat. 8 and 9 Vict., c. 106, Sec. 3-5-7 (Real Property Act 1845).

[140] Jenks's Modern Land Law, p. 192.

or **secondary, conveyance,** is one by which the estate originally created is enlarged, restrained, transferred, or extinguished.

Original conveyances include *feoffment*, *gift*, *grant*, *lease*, *exchange*, and *partition*.

Derivative conveyances include *release*, *confirmation*, *surrender*, *assignment*, and *defeasance*.

ORIGINAL CONVEYANCES

36. Feoffment.—A **feoffment** was formerly the instrument by means of which an estate in fee simple was conveyed. It meant, under the feudal system, the bestowing of a feud, or fief, or feudal estate. Its meaning now is the conveyance of an estate of inheritance to a man and his heirs.[141]

The proper and usual words of a feoffment are, *give*, *grant*, and *enfeoff*, though no specific words are necessary. A feoffment was always accompanied with livery of seizin, or the equivalent of feudal investiture. This mode of conveyance (by livery of seizin, etc.) is now obsolete.[142]

37. Gift.—A **gift** was the instrument used in creating an estate tail. It differed from a feoffment only in the magnitude of the estate which it passed, and, like it, required livery of seizin to be effectual. It is no longer of any importance in that connection.[143]

38. Grant.—A **grant** was the deed used to transfer title to incorporeal hereditaments. These were said to lie in grant to distinguish them from corporeal property, which lay in livery, it being impossible to deliver possession. This distinction no longer exists and all hereditaments, both corporeal and incorporeal, both in England and the United States, now lie in grant; that is, they are transferred by grant.[144]

39. Lease.—A **lease** is a conveyance of lands or tenements for life, for years, or at will, but always for a less

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141 Mitchell, Real Est. and Conv., p. 405.
142 *Ibid.*
143 *Ibid.*, p. 406.
144 *Ibid.*

time than the lessor has in the premises.[145] It is a contract for the possession and enjoyment of land on one side, and for a recompense or return of rent on the other. No form of words is necessary to create a lease; it is the intention that is considered. The lease is the instrument by which the relation of landlord and tenant is usually created.[146]

40. Exchange.—An **exchange** of realty is a mutual grant of equal interests, the one in consideration of the other. The word *exchange* must be used in the grant, and implies a mutual warranty. The mutual warranty, formerly, had the effect of giving either party the right to retake his own land in case the title to the land he had received in exchange turned out to be bad.[147] For this reason conveyancers, both in England and the United States, have abandoned entirely this form of conveyance. The estates exchanged were required to be of equal quantity; thus, a fee simple for a fee simple, a lease for twenty years for a lease for twenty years. Mutual deeds of bargain and sale are now used to effect the same purpose.

41. Partition.—A **partition** is when two or more joint tenants, or tenants in common, agree to divide the lands so held among them in severalty. All of the parties mutually convey the part to be taken by each and a deed is necessary for this purpose.[148]

DERIVATIVE CONVEYANCES

42. Release.—A **release,** at common law, is "a discharge or conveyance of a man's right to lands or tenements, to another that hath some former estate in possession." The words generally used therein are *remised*, *released*, and forever *quitclaimed*. Where a reversioner releases to the tenant for life, this extinguishes the reversioner's right and transfers it to the life tenant.[149] A modern definition of a release is

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145 See Estates for Years, *supra*.
146 See *The Law of Landlord and Tenant*.
147 2 Black. Comm. 323.
148 *Ibid.* 324.
149 *Ibid.* 325.

"the act of writing by which some claim or interest is surrendered to another."[150]

43. Confirmation.—A **confirmation** is a conveyance of an estate or right in existence, whereby a voidable estate is made unavoidable, or whereby a particular estate is increased. For example, if a tenant for life give a lease for forty years, and die at the end of twenty years. Here the one entitled to the reversion can defeat the estate for forty years, by claiming his reversion. But if, before the death of the life tenant, he had made a confirmation to the lessee for forty years, this would make sure the voidable estate of the lessee for years.[151]

44. Surrender.—A **surrender** is the yielding up of a less estate in possession to him that hath the greater estate in remainder, where the tenant for life or years yields up his estate to the remainder man or reversioner. This is the opposite of a release.[152]

45. Assignment.—An **assignment** is a transfer of a particular estate in lands, usually for a term of years. It is now used very frequently in transferring a bond and mortgage, and a ground rent. The apt words are "assign, transfer, and set over," to which are usually prefixed, "grant, bargain, and sell."[153]

46. Defeasance.—A **defeasance** is a deed annexing conditions to an estate granted in another deed executed at the same time.[154] The majority of the conveyances used at the present time in England and the United States owe their origin to the Statute of Uses. Of these, "the covenant to stand seised to uses" (a conveyance in which the owner, instead of transferring the land, agreed to hold it for the use of some other person) and *lease* and *release* are seldom, if ever, used.

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150 Anderson's Law Dict. 871.
151 2 Black. Comm. 326; Co. Litt. 278.
152 Mitchell, Real Est. and Conv., p. 411.
153 *Ibid.*, p. 411.
154 *Ibid.*, p. 412.

47. Lease and release was a conveyance devised to avoid the publicity of recording a transfer. As only bargains and sales of freehold estates were required to be enrolled, the practice arose of transferring the possession for a term of a year, after which a release of the reversion was made to the transferee.[155]

Modern conveyances, for the most part, are effected by deeds of *bargain* and *sale*, which are considered at length below.

PUBLIC GRANTS

48. All hereditaments, corporeal and incorporeal, in modern conveyancing, lie in grant; that is, they may be transferred by grant. Applied to real-estate law, a *grant* is a formal conveyance in writing of such things as cannot pass or be transferred by word only, as lands, reversions, titles, etc.[156] Grants, so considered, are either public or private. A **public grant** is the transfer by the state of public lands, or of lands belonging to it, to private persons. Title by public grant is conferred either by patent or by act of the legislature.

49. Land Laws.—The acquisition of public lands by private persons is regulated by the **land laws** of each particular government. In their general provisions, land laws differ but little; almost universally they require occupation as a preliminary formality. Those of the United States are given as typical of the others.

Title to the public lands of the United States may be acquired by private persons, (1) under homestead laws, (2) by public auction or private sale, (3) by taking up bounty lands or military land warrants, (4) under the Timber Culture Act,[156a] and (5) by reclaiming desert lands.[157]

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155 Mitchell, Real Est. and Conv., p. 415.
156 Cent. Dict.
156a Repealed by 26 Stat. at L. 1095.
157 U. S. R. S., Secs. 2,289, 2,317.

NOTE.—Besides the grants of public lands to private citizens, congress has, by statutes, given to certain corporations, generally railroads, the right to take certain parts of the public lands lying contiguous to the tracks or other portion of its property.

1. Land is acquired under the homestead laws by entering upon the land, improving it, and residing there continuously for five years. At the expiration of this period, upon proof of residence and improvement and of minor facts, the settler is entitled to a patent conveying the land to him absolutely upon payment of the government fees.

2. The president may at any time issue a proclamation declaring that certain land will be exposed to sale at public auction at a specified time, which sale shall continue for two weeks, during which the land will be sold to the highest bidder. The minimum price for such land is $1.25 per acre and no credit is allowed for the purchase money. At the end of this time, such of the land as remains unsold will be subject to private sale at $1.25 per acre.[158]

3. Congress has at different times granted military land warrants to certain soldiers, or their widows or children, entitling them to a certain portion of the public lands without payment of any money, unless the land is valued at more than $1.25 per acre, in which case the person holding the warrant is obliged to pay the difference between $1.25 and the price at which the land is rated.[159]

4. Under the Timber Culture Act of 1878, formerly; but by the act of congress of March 3, 1891, this act was repealed with a proviso saving all *bona fide* claims lawfully initiated before the passage of the repealing statute.[160]

5. If a person reclaims a portion of desert land by conducting water upon it, he is entitled to a patent for the land upon payment of the government fees within three years.[161]

50. In all these cases, the one who claims the land must be a citizen of the United States, or one who has filed his declaration of intention to become such, and must, also, be either the head of a family, a widow, or a person over twenty-one years of age.

Under the Homestead, Military Land Warrant, and Timber Culture Acts, no one person can acquire more than one

158 U. S. R. S., Secs. 2,353, 2,379.
159 *Ibid.*, Secs. 2,414, 2,446.
160 20 U. S. Stat., p. 113; 26 Stat. at L. 1095.
161 19 U. S. Stat., p. 377.

hundred and sixty acres of land. Six hundred and forty acres of desert land may be acquired by one person who reclaims it, and, in the case of land at public auction or private sale, the number of acres for which a patent may be issued is unlimited.

51. Preemption Laws. — There was formerly another method of acquiring public lands, known as *preemption*. Under the **preemption laws**, land was acquired by settlement upon the land subject to preemption, by improving it, and by residing thereon continuously for six months. At the end of that time, the settler was entitled to a patent conveying him the land absolutely, upon proof of residence, improvement, and other minor facts, and the payment of $1.25 or $2.50 per acre, according to the location of the land.[162] The preemption laws, however, were repealed by congress by act of March 3d, 1891.[163]

Certain other interests in public lands may be acquired by *prescription* or *appropriation*, as, for example, by taking up mining claims, and by appropriating waters.

52. Mining Claims. — A patent for public mineral lands may be obtained in the following way: The applicant must file an application under oath in the proper land office, showing a compliance with all the preliminary requirements; must post a copy of the plat together with a notice of the application on the land; and must file in the land office an affidavit of at least two persons that such notice has been duly posted, together with a copy of the notice. The register of the land office must post the notice in his office for sixty days, and publish it for the same period in a newspaper nearest to the claim. The claimant must, also, file with the register the certificate of the surveyor general that $500 worth of labor has been expended on improvements, made upon the claim, by the applicant or his grantors. At the expiration of sixty days, unless during that time an adverse claim has been filed with the register, the claimant is entitled to a patent for the land upon payment of $5.00 an acre,

[162] U. S. R. S., Secs. 2,257, 2,288. [163] *Ibid.*, Sup. 942.

if the claim be for a lode location, and $2.50 if for a placer location.[164]

53. Appropriation of Waters.—In England, mere occupation or appropriation of public water, unless it amount to prescription, confers no exclusive rights upon the one thus using it.[165]

In the United States, by the custom which has obtained among miners in the Pacific states and territories, where mining for precious metals is had on the public lands, the first appropriator of mines, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters. He acquired a special property in the water, which permitted him to use it in mining, and gave him the right to prevent it from being diverted or its quality impaired.[166] The same custom exists in the arid regions of the west with regard to the appropriation of waters for irrigation.[167]

54. State Lands.—The foregoing laws only apply to the public lands of the United States in the different territories, and not to public lands in the different states, unless the ownership and control of unappropriated lands were reserved by the United States at the creation of the state. But most, if not all, of the states have laws regulating the appropriation of public lands, under provisions which vary greatly in the different states. In some of the Western states, also, there are laws regulating mining claims, and the appropriation of waters.

55. Canadian Land Laws.—In Canada, an act called the *Dominion Act*, was passed in 1886, providing for the disposal of public land in that country. It is similar in many respects to the public-land laws of the United States, and authorizes the government to grant land under military warrants and homestead claims. It, also, provides for claims for mining, timber, grazing, and hay lands.[168]

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164 U. S. R. S., Secs. 2,318, 2,352.
165 6 Exch. (Eng.) 353 (1851).
166 20 Wall. (U. S.) 507 (1874).
167 14 U. S. Stat. 253 (1866).
168 49 Vict. (1886), Rev. Stat. of Canada, p. 817.

THE LAW OF PROPERTY

(PART 3)

PRIVATE GRANTS—DEEDS

1. A grant between private parties is called a **private grant.** The term is sometimes used synonymous with *deed*, which is the instrument by which a grant is effected. A **deed** is a writing sealed and delivered by the parties. More specifically, a deed is a writing made for the purpose of conveying real estate, and includes not only deeds of conveyance but all contracts, of whatever nature, which are evidenced by a sealed writing, as a mortgage, bond, lease, agreement to convey realty, and bill of sale. The term *deed* is here used only in the sense of the specific definition above given. The effect of a deed is to transfer the *title* to the property conveyed to the person named in the deed as the grantee.[1]

Title means ownership as applied specially to real property. It implies the *right* to possession, although the owner may not have the *actual* possession. Title is defined as the means whereby the owner of lands has the first possession of his property.[2]

No formal words nor special forms are necessary to constitute a valid deed. If an intention to pass title can be gathered from the instrument, it will be sufficient to make a valid conveyance irrespective of the inaccuracy of expression or the inaptness of the words used.[3]

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[1] Coke Lit. 171; Cent. Dict.; Anderson's Law Dict. 324.

[2] Coke Lit. 345, *b*.

[3] 8 Blackf. (Ind.) 141 (1846); 84 Tex. 107 (1892).

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THE PARTIES

2. Every deed must contain a *grantor* and a *grantee*, who must be so described therein that their identity will appear from the deed itself. The parties are best described by inserting in the deed their names in full; not merely the initials.[4] There is a presumption that one bearing the same name as the one mentioned in the deed is the person designated.[5] But where only the initials are used no such presumption arises, for the same initials may stand for any one of several names. Whether named or not, a deed is good, provided the parties be so described as to distinguish them from all others.[6] Thus, a grant to the heirs of A, A being dead, is good, for it is possible to ascertain who are the heirs of A. It was once thought essential that the grantor should be named in the body of the deed. But this, although generally done, is not absolutely necessary, if the grantor sign it.[7] For any one who signs, seals, and delivers a deed is bound by the covenants contained in it, though his name appear on the paper only in the signature.[8]

3. The Grantor.—Every person who is legally competent to contract may convey his real estate by deed. *Legally competent* means competent under the laws of the place where the land is situated. For one may have full capacity to convey property under the laws of one state or country, and be totally without such capacity under the laws of another.[9]

4. The Grantee.—The grantee, unlike the grantor, need not have the power to contract. But he must be a person, natural or artificial, and be in existence at the time of the execution of the deed.[10] Thus, a deed to a fictitious person, or to a dead man and his heirs, or to a corporation which has no existence, is inoperative.[11] To render a deed

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[4] 83 Ill. 381 (1876).
[5] 9 Johns. (N. Y.) 74 (1812).
[6] 2 Wall. (U. S.) 607 (1864).
[7] 66 Wis. 252, 255 (1886).
[8] 2 N. H. 525, 527, 529 (1823); 45 S. W. (Tex.) 942 (1898).
[9] 9 Wheat. (U. S.) 565 (1824); 14 La. Ann. 85 (1859); 27 Ark. 482 (1872).
[10] 13 Ohio 120 (1844); 23 U. S. App. 154 (1894).
[11] 18 Fed. Rep. 273 (1883); 45 N. C 164 (1853).

operative, delivery is essential and there can be no delivery to a party not in existence. The deed must also designate the grantee; otherwise it is a nullity and passes no title.[12]

DISABILITIES OF PARTIES

5. Insanity.—The deed of an insane person does not bind him. Such deeds are not void but voidable and may be subsequently ratified by the lunatic during a lucid interval; and where the purchase and conveyance is made in good faith for a good consideration and without knowledge of the insanity, the consideration must be returned before the conveyance can be avoided.[13] But the deed of a person who has been judicially declared insane and placed under guardianship is absolutely void and conveys no title to the purchaser.[14]

6. Drunkenness.—To avoid a deed on the ground of intoxication, it must be shown either that the intoxication was produced by the act or connivance of the person against whom the relief is sought, or that an undue advantage was taken of the party's situation.[15] A deed made by a person while intoxicated may be ratified by him upon becoming sober.[16]

7. Duress—Undue Influence.—Where a deed is executed under compulsion, or where undue influence is brought to bear upon the person executing it, the deed may be avoided, but application must be made to the court within a reasonable time.

8. Infancy.—Deeds made by persons not of full age are unenforceable against the infant grantor. The conveyance, however, is not absolutely void, but merely voidable. Upon coming of age, the infant must make his choice, either to disaffirm his deed or to ratify it. If he ratify it, he is bound; a disaffirmance renders the deed invalid. There can

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12 Am. & Eng. Encyc. Law (2d Ed.), Vol. 9, p. 132.

13 30 S. E. 201 (1898); 8 Vroom (N. J.) 108 (1874); 37 N. J. Law 108 (1874).

14 54 Kans. 560 (1895); see *The Law of Contracts:* Parties.

15 25 N. J. Eq. 485, 486 (1875); 29 N. J. Eq. 156 (1878).

16 3 Dru. & War. (Eng.) 64 (1842).

be no disaffirmance, nor can there be ratification, until the infant has attained his majority.[17] To avoid the deed, he must immediately, by word or act, disaffirm the instrument.[18] Notice that he disaffirms followed by ownership indicating a claim of title against the conveyance intended to be disaffirmed, such as cancelation of the deed, payment of taxes, selling, leasing, improving the premises, or similar acts, will be sufficient to avoid the deed, if done by the infant within a reasonable time after becoming of age.[19]

9. Married Women.—At common law, a married woman was unable to convey property by deed. The married women's enabling statutes, both in England and in the United States, permit a married woman to alienate her lands by appropriate instrument.[20]

10. Joint Owners.—Neither a joint tenant nor a tenant in common can do any act to the prejudice of his cotenants in their estate. A conveyance by one tenant of a parcel of a general tract, owned by several, is inoperative to impair any of the rights of his cotenants; and the conveyance must be subject to the ultimate determination of their rights. One tenant cannot appropriate to himself any particular parcel of the general tract, because, upon a partition, which may be demanded by his cotenants at any time, such parcel may be entirely set apart in severalty to one of the other tenants. He cannot defeat this possible result while he holds his interest, nor can he defeat it by the transfer of his interest. He cannot, of course, invest his grantee with rights greater than those he possesses. The grantee must take, therefore, subject to the contingency of the loss of the premises, if, upon the partition of the general tract, the tract conveyed to him should not be allowed to his grantor. Subject to this contingency, the conveyance is valid and passes the interest of the grantor. Until partition, the

[17] 24 Cal. 195 (1864); 31 Mich. 182 (1875); 4 Harr. (Del.) 75 (1843).

[18] 85 Ky. 288 (1887); 17 Wend. (N. Y.) 119 (1837); L. R. App. Cas. (Eng.) 360 (1893).

[19] 88 Ill. 386 (1878); see *The Law of Contracts:* Parties, Infants.

[20] See *The Law of Husband and Wife.*

grantee will be entitled to the use and possession as cotenant, in the parcel conveyed, with the other owners.[21]

11. Partners.—One partner cannot bind his copartner by deed without authority for that purpose.[22] In order to pass title to partnership real estate the deed must be executed by each partner, or by some one legally authorized to do so for the partner who does not.[23]

REQUISITES OF DEEDS

12. Writing.—By statute, in England and the United States, a deed for the conveyance of real estate must be in **writing.**[24] The material used should be paper or parchment. It may be in any character or language, but it should be upon paper or parchment, for it is said that if it be written on stone, board, linen, leather, or the like, it is no deed. Deeds are generally written with ink, or partly with ink and partly printed; but they are valid if entirely printed or typewritten.[25]

A deed must be *completely written before delivery*. If a blank instrument be signed, sealed, and delivered, and afterwards filled up, it is no deed.[26] The filling in of blanks in a deed after delivery make a redelivery necessary.[27] When a deed is partly written and partly printed, the writing prevails against the printing, where they are inconsistent.[28]

Bad punctuation or bad spelling will not invalidate a deed if the intention of the parties can be gathered from the instrument.[29] Erasures and interlineations in a deed, if made before execution, do not invalidate it; the deed will stand as altered.[30] But if made afterwards, the alteration, if in a material part of the deed, will destroy the deed.[31] An alteration made after delivery destroys the deed as to the party making the alteration. It is the deed that is rendered void, not the

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21 15 Cal. 361, 368 (1860).
22 4 S. & M. 261 (Miss.) (1845).
23 13 Peters (U. S.) 423, 433 (1839); see *The Law of Partnership*.
24 Stat. 29 Chas. II, c. 3, Secs. 1, 2, & 3 (1677); 6 Pet. (U. S.) 124 (1832).
25 2 Black. Comm. 297; 14 Johns. (N. Y.) 484 (1817).
26 1 Hill (S. C.) 267 (1833); 6 M. & W. (Eng.) 216 (1840).
27 110 U. S. 119 (1884).
28 18 Iowa 17 (1864).
29 11 Pet. (U. S.) 41 (1837).
30 92 Ill. 194 (1879).
31 5 Ben. (U. S.) 266-273 (1871).

estate. By a deed duly executed the title passes, and its total destruction, or even its cancelation by the grantee himself, will not revest the title in the grantor; the estate remains in the grantee until it is passed to another by some mode of conveyance recognized by law.[32] An immaterial alteration of a deed, although made by a party thereto, or a material alteration, if made by a stranger, will not affect its validity.[33]

FORMAL PARTS

13. The formal parts of a deed are the *premises*, the *habendum*, the *tenendum*, the *reddendum*, the *conditions*, the *covenants*, and the *warranty*.

THE PREMISES

14. All that is contained in a deed preceding the *habendum* is included in the **premises**, in which are set forth the names of the parties, the consideration, the recitals necessary to explain the reasons for executing it, and a description of the property conveyed.

In deeds of indenture (those executed by both parties, grantor and grantee), the *date* is put in the premises; in deeds poll (those executed by one party only, the grantor), it is placed in the testimonium or witness clause.

The date is not essential to the validity of the deed, and, in the absence of statutory requirement, its omission will not invalidate the instrument. In case of the omission of the date, the deed will take effect from the time of delivery, which, in point of law, establishes the real date of the deed. A deed executed by more than one grantor is considered as dated when the last grantor executes it.

The granting words are also contained in the premises. The following technical words are the ones generally used: *give*, *grant*, *bargain*, *sell*, *alien*, *enfeoff*, *release*, and *convey*. But it is not essential that they or any of them be used, if the words used clearly show an intent on the part of the grantor to convey the estate granted.[34]

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[32] 53 Pa. 313, 319 (1866). [33] 91 Pa. 242 (1879). [34] 31 Mo. 541 (1862)

15. Description of Property. — The purpose of the *description* is to furnish the means of identifying the property which the other clauses of the deed are designed to convey.[35] Deeds are void for uncertainty if they purport to convey land but contain no description or designation thereof;[36] or if the description be so uncertain that it cannot be known what property is intended to be conveyed.[37]

A description is sufficient if it refer to certain known objects or things and provide definite means for ascertaining the limits of the property conveyed.[38] Where it is such that a surveyor can locate the property it is sufficient.[39] If the description furnish a starting point and give the boundary lines by admeasurement, it will not be void for uncertainty, though the distances named be so many feet "more or less," the words *more* and *less* being treated as surplusage.[40]

But a deed is void for uncertainty if the description of the property conveyed fail to name the township, county, and state, in which it is located.[41] But the mere failure to state the county will not make it so.[42]

16. What Passes Under a Description. — When property is granted, all the means of access to it, and all the fruits and effects of it, are also granted, and they pass with the thing granted without the use of words specifically mentioning them.[43] Thus, with a grant of land pass all its usual and accustomed ways, and if there be no usual way, the grantee will have a way of necessity over the land next adjoining. The grant of trees carries with it the right to cut them down and carry them away. The grant of a mill carries with it the right to the use of the watercourse coming to the mill and furnishing power for working it, and of the flood gates, dam, race, and all other things necessary for its use.[44]

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35 23 Tex. 36-44 (1859).
36 145 Ind. 40 (1894).
37 4 Iowa 314 (1856); 41 Cal. 263 (1871).
38 12 Wis. 388 (1860).
39 32 Fla. 264 (1893); 1 Sm. & M. Ch. (Miss.) 338 (1843).
40 89 Ind. 473 (1883).
41 30 Ark. 657 (1875).
42 45 Ala. 482 (1871).
43 Pres. Shep. T., c. x, p. 89; 4 Pa. 353, 484 (1846).
44 81 Mass. 154, 156 (1860); see *subtitle* Easements *supra*.

The term *messuage* is often used in describing what is intended to be conveyed, but is very indefinite in its exent, in some cases including not only the dwelling house, which always seems to be implied in the term, but whatever buildings are included within the curtilage around the house, and the curtilage itself, orchard, garden, or yard; and even, in some cases, a farm, or a manor, when clearly intended to be described in that way; and the grant of a messuage or a house, and all lands thereunto appertaining, will pass all lands usually occupied in connection with it.[45]

A deed is generally so carefully and accurately drawn that from merely reading it one can readily understand just what is intended to pass; but, sometimes, through vagueness in the description, or by reason of inconsistent clauses, it is utterly impossible to tell, from the deed, what, if any, estate is intended to be conveyed; the courts have, therefore, adopted certain rules of construction with reference to such cases. These are: (1) The intention of the parties is the controlling factor in the construction of the deed.[46] (2) A deed must be so construed, if possible, that no part shall be rejected.[47] (3) A deed or grant is to be construed most strongly against the grantor.[48] For example, if there be two descriptions of the land conveyed which do not coincide, the grantee is entitled to hold that which will be the more beneficial to him.[49]

17. Reference to Other Deeds.—Where one deed refers to another for a description of the granted premises, the deed referred to becomes a part of the other, and the description contained in it is regarded as of the same effect as if copied into the deed itself.[50]

18. Reference to a Map.—Where a map or plan of a tract of land is referred to in a deed as containing a description of the premises therein conveyed, the map or plan is to

[45] Washb. R. P., 5th Ed., Vol. 3, p. 421; 2 Bing. (Eng.), N. C. 617 (1836); 53 Me. 79, 81 (1865).
[46] 70 Pa. 235, 237 (1871).
[47] 42 Pa. 374, 386 (1862).
[48] 22 Cal. 224 (1863); 101 Pa. 11-15 (1882).
[49] 50 Me. 331 (1862); 5 Metc. (Mass.) 15 (1842).
[50] 24 Cal. 435 (1864); 15 N. H. 504 (1844).

be regarded as giving the true description of the land conveyed as if it were expressly recited and marked down in the deed itself.[51] When lines are laid down on a map or plan, and are referred to in a deed, the courses, distances, and other particulars appearing thereon, are regarded as the true description of the land conveyed, just as if expressly recited in the deed.[52]

If two clauses of a deed be so repugnant that they cannot stand together, the first must prevail over the last, but the granting clause will control an introductory recital as to the interest intended to be conveyed.[53] This rule applies to all objects visible, fixed, and clearly ascertained, such as the lands of other individuals or their corners, clearings, a stake, post, stone, or road.

19. Monuments.—In construing deeds containing conflicting descriptions, the description least likely to be affected with mistakes is to be adopted. That description should be followed which is the most stable and certain, and monuments are followed as against courses and distances, because, of the two, monumental lines are more stable and certain and less liable to be mistaken.[54]

20. Landmarks.—A description of a line in a deed by natural or artificial landmarks, clearly identified, will control one by course or distance where they do not agree. For example where "in the description of a deed, one line was described to run 'thence westerly including the Canadas, to a stake, so that a line running from thence to the Dos Pedros will pass about two hundred yards from the present new corral of the said José Jesus Lopez,' it was held, that the line was to be located by the natural landmarks mentioned, although these determined its course to be northeasterly instead of westerly."[55]

21. Quantity.—When the quantity of land mentioned in a deed, as part of the description, is inconsistent with the

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[51] 24 Cal. 435 (1864).
[52] 17 Mass. 207, 211 (1821).
[53] 29 Ala. 588 (1857).
[54] 24 Cal. 445 (1864); 17 Mass. 210.
[55] 22 Cal. 496, 502 (1863).

actual area of the premises, as ascertained by known monuments or other certain description, it will be rejected.[56] If, within the boundaries, according to the description, there be more or less than the quantity of land mentioned, the grantee takes all included within the description, provided the grantor had the right to convey all.[57] Thus, a conveyance of a tract of land by metes and bounds as containing one hundred and seventy-four acres, where the tract in reality contained two hundred and fourteen acres, the deed is not void with respect to the surplus but passes the legal title to the whole tract.[58]

22. Rivers.—Where a river is named as a boundary line of a tract of land, the boundary line follows the meanders of the stream. When the boundary line is to run up or down a stream not navigable, a given distance, the meanders of the stream are to be followed until the required distance, when reduced to a straight line, is attained.[59]

HABENDUM AND TENENDUM

23. The **habendum** and **tenendum** comprise the *to-have-and-to-hold* clause which follows the premises. It is not an essential part of the deed, but serves to qualify, define, or control it. It may be entirely rejected if repugnant to the other clauses of the conveyance.[60] The purpose of the habendum is to define precisely the extent of the interest granted. It may lessen, enlarge, explain, or qualify the interest described in the premises, but it must not be totally repugnant to it. If, in the premises, an estate be granted to a person in fee simple, it may by the habendum be lessened to an estate tail.[61] In such case, effect will be given both to the premises and to the habendum; for the latter does not contradict the former. But, if the habendum be absolutely repugnant to the premises, if it cannot be reconciled with them so that full effect can be given to both, it must give way, and the premises must stand. Where, in

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56 33 Iowa 110, 112, 113 (1871).
57 2 Johns. (N. Y.) 37, 41 (1806).
58 4 Metc. (Ky.) 103 (1862).
59 25 Cal. 122 (1864).
60 51 Mo. 227, 232 (1873).
61 42 Pa. 374 (1862).

the premises, an estate is granted to a person and his heirs, and the habendum gives him a life estate, there is an irreconcilable contradiction, for it cannot be an estate for life and an estate in fee simple; either the word *heirs* in the premises must be stricken out, or effect must be denied to the habendum, and, in such case, the habendum will be inoperative.[62]

REDDENDUM

24. The **reddendum** follows the habendum and is used when it is desired to reserve anything out of the property conveyed. In general, a reservation is something to be deducted from the thing granted, narrowing and limiting what would otherwise pass by the general words of the grant.[63] The same certainty of description is required in a reservation out of a grant, as in the grant itself. Thus, if a deed reserve one acre of the land and there be nothing in the reservation to locate it, the reservation is void for uncertainty, and the grantee will take the entire tract.[64]

CONDITIONS

25. **Conditions** in deeds restraining or limiting the effect thereof are properly inserted after the habendum or reddendum.[65]

COVENANTS

26. The **covenants** of the deed follow the conditions. A covenant, in its ordinary meaning, is simply a contract to do or not to do a certain thing. It has not of necessity any reference to real estate or conveyancing. In a deed, it is an undertaking by the grantor that certain things are true of the land and that if they be not true he stands ready to make them so or render an equivalent. It is "a contract entered into between two or more parties for the performance of certain acts or the observance of certain formalities." Being a contract, the rules of the law of

62 42 Pa. 386, 387 (1862); 1 S. & R. (Pa.) 374, 375 (1815).
63 9 Metc. (Mass.) 404 (1845).
64 30 Ark. 640 (1875).
65 See *subtitle* Estates Upon Condition *supra*.

contracts as to capacity of parties, etc. must be observed in its creation. Covenants are distinguished as *real covenants* and *personal covenants*, those which run with the land and those which do not.[66]

27. Covenants Running With the Land.—A covenant runs with the land when either the liability for its performance or the right to enforce it passes to the assignee of the land itself; but in order that a covenant may run with the land, its performance or non-performance must affect the nature, quality, or value of the property demised, or it may affect the mode of enjoyment, independently of collateral circumstances; and, in all cases, there must be a privity of estate between the contracting or covenanting parties.[67]

As a rule, all covenants which relate to and are for its benefit run with the land, and may be enforced by each successive assignee into whose hands it may come by conveyance or assignment. Where, however, the covenant relates to matters collateral to the land, its obligation will be confined strictly to the original parties to the agreement. There is a wide difference between the transfer of the burden of a covenant running with the land and of the benefit of the covenant; or, in other words, of the liability to fulfil the covenant and the right to exact its fulfilment. The benefit will pass with the land to which it is incident, but the burden or liability will be confined to the original covenantor, unless the relation of privity of estate or privity of tenure exist or be created between the covenantor and covenantee at the time of the making of the covenant. This follows from the principle that the obligation of all contracts is ordinarily limited to those by whom they were made, and if privity of contract be dispensed with, its absence must be supplied by privity of estate. Where a covenant is not of such a nature that the law will permit it to be attached to an estate as a covenant running with the land, it cannot be made such by an agreement of the parties.

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[66] Jenks's Modern Land Law, p. 315. [67] Mitchell, Real Est. and Conv., p. 442 *et seq.*

WARRANTY

28. The **covenant of warranty** is usually last of all the covenants in a deed and is a covenant running with the land. In any conveyance for value, the grantor is deemed to have entered into a covenant to the following effect: (1) That he has a right to convey the premises in the manner and on the terms expressed in the conveyance; (2) that the purchaser shall enjoy the premises, undisturbed by any claim made by or through the conveying party or any one for whom he is responsible; (3) that the conveying party will indemnify the purchaser against all incumbrances created by the same persons, and not expressly reserved by the conveyance; (4) that the conveying party and all such other persons will, at the request and cost of the party demanding it, do any act necessary for further assuring the premises to the purchaser or his successors in title. The covenant for further assurances is simply a promise on the part of the person making the conveyance, that whatever steps may be necessary to perfect the title of his grantee will be performed by him. Thus, if the covenantor have purported to convey a fee simple, unencumbered, to the grantee or covenantee, he must, at demand of the latter, discharge any mortgage that may exist against the premises.

Covenants are sometimes divided into *express* and *implied*. The covenant of warranty above described is implied in a deed if not expressed, but, in some of the United States, implied covenants have been abolished by statute.[68] A covenant of warranty is also general or special. When *general*, it applies to lawful adverse claims of all persons whatsoever; when *special*, it applies only to certain persons or claims to which its operation is limited or restricted. In the United States, the covenant of warranty is in general use in conveyancing. In England, it is not in use.

[68] 4 Kent's Comm., * p. 474.

REQUISITES TO VALIDITY

29. The deed being properly constructed, certain other steps are necessary to give it force and validity. These are (1) *reading*, (2) *execution*, (3) *delivery*, (4) *attestation*, (5) *acknowledgment*, and (6) *recording*.

READING

30. Wherever any of the parties desire it, the deed must be read and read correctly; otherwise, it may be avoided.[69]

EXECUTION

31. Signing and Sealing.—The correct method of executing a deed is by each party who is to be bound signing it and placing a seal opposite his name. Prior to the enactment of the statute of frauds, sealing alone was sufficient to authenticate a deed; by the statute, signing is an essential part of the execution.[70] There is no particular form of *signature;* any writing clearly showing that a party has adopted a sealed instrument as his own, intending to be bound by the contents of it, is sufficient.[71]

Sealing, or affixing a seal to the signatures in a deed, was absolutely necessary at common law, and it is now essential to the validity of a deed in all jurisdictions, except where the use of a seal has been abolished by statutes.[72] Where a seal is indispensable an instrument cannot be considered a deed unless it be actually sealed; the mere recital that it is sealed without actually affixing a seal will not validate the instrument.[73] The character and sufficiency of the seal itself to contracts is explained elsewhere.[74]

32. Execution Under Power of Attorney.—In the execution of a deed under a power of attorney, the same requisites must be complied with, and the same solemnities and formalities should be observed, as are necessary in a

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[69] 2 Black. Comm. 304.
[70] Mitchell, Real Est. and Conv., p. 452.
[71] 12 Cal. 564 (1859).
[72] Shep. Touch. 56; see Stats. Ala., Iowa, Kans., Ky., La., and Tex.
[73] 1 Black. (Ind.) 241 (1823).
[74] See *The Law of Contracts:* Authentication, Sealing.

deed directly conveying the estate.[75] This rule, however, so far as the sealing is concerned, does not apply to corporations, and an officer thereof may make a deed on its behalf without being authorized by power of attorney to affix the seal of the corporation.[76] The proper way for an attorney in fact to execute a deed is to sign the name of the principal and add his own name as agent. Thus, where B is A's attorney, a deed executed by B under such power should be signed "A by B, his attorney in fact."[77]

33. Execution by Corporations.—The general agency through which a corporation acts is its board of directors, trustees, or other governing body elected by the stockholders.[78] The power to convey corporate property can be conferred only by such body when assembled and acting in that capacity.[79]

The technical *mode of executing* the deed of a corporation is to conclude the instrument which should be signed by some officer or agent, in the name of the corporation, with "In testimony whereof the common seal of said corporation is hereunto affixed," and then to affix the seal.[80] The execution should be in the corporate name and under the corporate seal, and not in the name and under the seal of the agent of the corporation.[81] Thus, a deed executed in the name of the president of a corporation, purporting to convey its lands, is inoperative.[82]

DELIVERY

34. In conveyancing, **delivery** is the transfer of a deed from the grantor to the grantee, or some person acting in his behalf, in such a manner as to deprive the grantor of the right to recall it at his option.[83] Delivery is such an important essential that there can be no perfect deed without it; for, although properly executed and valid in other respects,

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75 8 N. H. 31 (1835); 30 N. H. 420 (1855).
76 4 Humph. (Tenn.) 403 (1843); 14 Conn. 594 (1842).
77 16 Mass. 42 (1819).
78 6 S. & R. (Pa.) 508 (1821).
79 33 Cal. 11 (1867).
80 12 N. H. 430, 433 (1841).
81 1 Ohio St. 390 (1824).
82 1 Neb. 439 (1871).
83 Bouv. Law Dict.

a deed will not pass the title to the property intended to be conveyed without delivery.[84] The deed takes effect from the time of delivery.[85]

The delivery may be *absolute*, as where there is an actual transfer of the instrument from the possession of the grantor to that of the grantee, or it may be *conditional*, as where the instrument passes from the possession of the grantor but is not to be completed by possession in the grantee until the happening of some event; such a delivery is called an **escrow.**[86]

The act of delivery is not necessarily a transfer of the possession of the instrument to the grantee and an acceptance by him, but it is that act of the grantor, indicated either by acts or words or both, which shows an intention on his part to perfect the transaction by a surrender of the instrument to the grantee, or to some third person for his use and benefit. If both parties be present when the usual formalities of execution take place and the contract be fully carried out and nothing remain to be done, except the empty ceremony of passing the deed from the grantor to the grantee, the deed is good and valid though it remain in the custody of the grantor. And the execution of the deed in the presence of an attesting witness is sufficient evidence from which to infer delivery.[87] But where there is not an actual transfer of the deed, it must satisfactorily appear, either from the circumstances of the transaction or the acts or words of the grantor, that it was his intention to part with the deed and put the title in the grantee. When a deed duly executed is found in the hands of a grantee, there is a strong implication that it has been delivered, and only clear and convincing evidence can overcome this presumption.[88]

35. Acceptance by Grantee. — There can be no delivery without acceptance, but it need not be in person; it will be good if authorized or approved by the grantee.[89] When

[84] 2 Black. Comm. 307.
[85] 44 Ill. 302 (1867).
[86] Bouv. Law Dict.
[87] 9 Allen (Mass.) 102, 106 (1864).
[88] 88 Ill. 379, 387 (1878).
[89] 4 Wis. 537 (1857).

not actually delivered to the grantee or his agent authorized to receive it, notice to him of its execution and such additional circumstances as will afford a reasonable presumption of his acceptance of it must be proved. The presumption that a party will accept a deed, because it is beneficial to him, will never be carried so far as to consider him as having accepted it.[90]

36. Delivery in Escrow. — "The delivery of a deed as an escrow is said to be when one doth make and seal a deed and deliver it unto a stranger until certain conditions be performed and then be delivered to him to whom the deed is made to take effect as his deed."[91] A deed can only be delivered as an escrow to a third person, and then it must be agreed that the deed is to be delivered to the grantee upon the performance by him of the stipulated condition.[92]

If delivered to the grantee, it passes title at once. If it be intended that it shall not take effect until some condition subsequent shall be performed, or some subsequent event shall happen, it must not be delivered to the grantee. For after delivery it cannot be shown by extrinsic evidence that a deed absolute on its face was intended to take effect only upon the performance of some condition not expressed therein. An escrow is simply the conditional delivery of a deed which is to take effect upon the happening of some event consistent with the instrument, and not a condition of delivery repugnant to the contract and varying its terms. It can never take effect as a deed till the performance of the condition, even though the grantee obtain possession of it before such performance. Thus, where the condition was that the grantee was to give a bond for the support of a third person, and the bond had not been given, it was held that the deed could not take effect, although the support had been in fact furnished such third person during his life, and he had died.[93]

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[90] 28 Tex. 759, 773 (1866).
[91] Shep. Touch. 59.
[92] 11 Barb. (N. Y.) 349, 351 (1851); 30 Cal. 208, 213 (1866).
[93] 32 Vt. 341, 347 (1859); 23 Cal. 528, 536 (1863).

ATTESTATION

37. It is usual to have witnesses to attest the execution and delivery of the deed. In some of the United States, the statutes prescribe the number of witnesses who must attest a deed. In others, no witnesses are required.[94] An **attesting witness** is one who signs his name to an instrument in order to be able at a future time to prove its due execution. Within the meaning of the rule, he is one who was present when the instrument was executed, and who at that time subscribed his name to it as a witness of the execution. The witness, however, need not be present at the moment of execution. If he be called in by the grantor and told that it is his deed and requested to subscribe his name as a witness, that will be enough. The execution by the parties and the subscribing by the witness are then considered as parts of the same transaction.[95] At common law, attesting witnesses were not necessary to the validity of a deed.[96]

ACKNOWLEDGMENT

38. Definition.—Acknowledgment is the act of one who has executed a deed in going before some competent officer or court and declaring it to be his act or deed.[97] The term is also used to designate the certificate of the officer that the deed was acknowledged before him by the person who executed it.[98] The acknowledging of deeds was unknown to the common law; it is a requisite created by statute. In most of the United States, statutes provide in what manner the acknowledgment of deeds may be taken, within and without the respective states.[99]

39. By Whom Taken.—Only persons authorized by statute may take acknowledgments of deeds. The officers generally designated as authorized to take acknowledgments are judges, justices of the peace, notaries public, clerks

[94] See *Appendix*.
[95] 6 Hill (N. Y.) 303, 305 (1844).
[96] 12 Metc. (Mass.) 157–166 (1846).
[97] Bouv. Law Dict.
[98] Cent. Dict.
[99] See *Appendix:* Acknowledgment of Deeds.

of court, commissioners of deeds, recorders, and mayors of cities.[100]

40. The Effect. — The acknowledgment of a deed entitles it to be recorded and also to be received in evidence, without further proof of execution.[101] The acknowledgment is no part of the deed itself, but is required by statute as evidence of execution or of authority for registration. Acknowledgment is not essential to its validity, and except where statutes make acknowledgment an essential part of a deed, a deed that appears on its face to have been regularly executed, and its execution attested by subscribing witnesses, is admissible in evidence.[102] As between the parties, the grantor and grantee, an unacknowledged deed is good, and it is also good as to subsequent purchasers with actual notice.[103]

41. Essentials of Acknowledgment. — Four essential facts must substantially appear in the certificate of acknowledgment, viz.: (1) That the person making the acknowledgment personally appeared before the officer who made the certificate; (2) that there was an acknowledgment; (3) that the person who made the acknowledgment is the one executing the instrument; and (4) that his identity was either personally known or proved to the officer taking the acknowledgment.[104]

42. When to Be Made. — Unless a specified period is designated by statute within which the acknowledgment must be taken, it may be taken at any time.[105] It is only necessary that it be taken after the deed is executed; if it be made at any time between the making of the deed and the offering of it for record or in evidence, it will be good. The mere fact that the date in the acknowledgment of a deed is prior to execution will not invalidate it.[106]

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100 35 Ala. 275 (1859); 36 Ill. 161 (1864); 11 Kans. 611 (1873).
101 2 McLean (U. S.) 412 (1841).
102 2 Iowa 378 (1856).
103 8 Kans. 112 (1871).
104 36 Ill. 362, 369 (1865); 28 Ill. 219 (1862)
105 1 Ala. 186 (1840).
106 19 Ohio 406 (1850).

43. By Whom Made.—Acknowledgment of a deed is properly made by the person who executes it; a deed executed by one person and acknowledged by another is inoperative.[107] But one who is authorized to *execute* a deed for another is likewise authorized to *acknowledge* it. Thus, a deed signed "A B guardian for C D" and acknowledged by the guardian "to be his act and deed as guardian aforesaid and thereby the act and deed of the said C D" is a good execution and acknowledgment.[108]

44. By Corporations.—Deeds of corporations should be acknowledged by their duly authorized agent; the power of attorney or the designation of the person who is empowered to acknowledge the deed, may, in some of the United States, be embodied in the deed or conveyance.[109]

45. By a Married Woman.—A married woman, unless given the power by statute, cannot acknowledge her deed by an agent or attorney, but must make the acknowledgment in person and generally separate and apart from her husband. Recent statutes in the United States enable a married woman to make acknowledgment in the same manner and form as though she were unmarried, the acknowledgment to have the same force and effect as an acknowledgment taken separate and apart from her husband, as required by former statutes.[110]

46. Defective Acknowledgments.—A defectively acknowledged deed will not pass title as against a subsequent *bona fide* purchaser for value without notice, though it be recorded; the recording in such a case will be of no effect.[111] The acknowledgment is defective when it does not comply with the statutory requirements; but it will be valid as against all persons having actual knowledge of its existence.[112]

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[107] 3 Harr. & J. (Md.) 243 (1811); 25 W. Va. 127 (1884).

[108] 13 Pet. (U. S.) 17 (1839).

[109] Laws of Pa., p. 171 (1901).

[110] Laws of Pa., p. 67 (1901).

[111] 13 Ohio 260 (1844); 4 Dana (Ky.) 325, 330 (1836).

[112] 87 Iowa 739, 744 (1893); 1 Dall. (Pa.) 436, 459 (1789).

RECORDING

47. Throughout the United States there are systems of *registration*, the outgrowth of legislation, for making a public record of all instruments affecting the title to real estate, established and maintained for the purpose of giving certainty and notoriety to title. In England, systems of registration exist only in the counties of York and Middlesex. Elsewhere, title to property can be proved only by production of the deeds. Upon a transfer of property, the title-deeds pass to the purchaser; that is, they are an essential part of the transaction. The purpose of the recording acts is to protect an innocent purchaser from one who seems to be the owner of real estate, but who, as between himself and the previous vendee, is not the owner.

48. Priority of Time.—It is generally provided by the statutes of the different states that deeds recorded within a specified time after their execution shall have priority over any instrument of later date.[113] For example, where a statute allows three months in which to record a deed, the deed so recorded will have priority over the deed of a person who purchases subsequently for a valuable consideration without notice, and gets his deed on record before the first party.[114] But a deed, when recorded after the prescribed time, operates as notice only from the date of filing and recording.[115]

49. Effect as Between the Parties.—The recording acts do not destroy the conveyance as between the parties to it, though not recorded, and an unrecorded deed is good evidence of a transfer of the title, not only against the parties to it, but against all the world except subsequent purchasers without notice and, in some states, creditors.[116]

50. Notice.—Where a subsequent purchaser whose deed is registered had actual notice at the time of his purchase of a prior unregistered deed, the prior deed shall have the preference, for the object of the recording acts is to give

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113 23 S. C. 543, 545 (1885).
114 62 Ala. 365, 369 (1878).
115 6 Ala. 801 (1844).
116 10 Johns. (N. Y.) 466, 467 (1813); 9 Dana (Ky.) 76, 77 (1839); 2 Marsh (Ky.) 454, 457 (1820).

notice to subsequent purchasers; in this case, the object is answered and the purchase under such circumstances is a fraud.[117] The doctrine of **notice** is recognized in England, and in all of the United States, except Ohio and North Carolina. In the latter states, no notice, however full or formal, will supply the place of registration.[118]

51. Who Is a Purchaser. — Just who is a purchaser within the meaning of the recording acts is sometimes very difficult to determine, and the decisions on this point are in conflict. In the case of a mortgage for a valuable consideration passing at the time, the mortgagee is, to the extent of the consideration, a purchaser for value;[119] and a trustee named in a deed of trust is, like a mortgagee, a purchaser for value.[120] Specifically, in law, a **purchaser** is one who acquires property by the payment of a consideration.

52. Mortgage to Secure Preexisting Debt. — A mortgagee, in a mortgage given for the security of a preexisting debt, is not generally regarded as a purchaser for a valuable consideration. For, although he is a purchaser without notice, he is not a purchaser for value. He occupies no better position than his mortgagor.[121]

53. Assignee of Mortgage. — An *assignment* of a mortgage is a conveyance under the recording acts. Hence, an **assignee of a mortgage** is a purchaser, and an unrecorded deed or mortgage will not have priority over his recorded assignment.[122]

54. Judgment Creditor. — A **judgment, or attaching, creditor** is not a purchaser within the meaning of the recording acts, and his lien does not take precedence over a prior unrecorded deed or mortgage of which the creditor had no notice. The reason is that it is the property of the debtor which is bound by the lien of the judgment, and

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117 10 Johns. (N. Y.) 457, 461 (1813).
118 14 Ohio 428 (1846); 70 N. C. 358 (1874); 20 Ohio St. 263 (1851).
119 3 Lea (Tenn.) 656 (1880); 24 Ind. 14 (1865).
120 95 U. S. 16 (1877).
121 56 Cal. 370, 373 (1880).
122 83 N. Y. 215 (1880); 79 N. Y. 23 (1879).

if he have sold it, there is no property to be bound by the judgment.[123]

55. Purchaser at Sheriff's Sale.—The law makes no distinction between purchasers at sheriff's sale and purchasers at private sale. Hence, one purchasing at such sale without notice, actual or constructive, takes precedence over an unrecorded deed or mortgage.[124] But, if the creditor himself purchase and pay no new consideration, the better rule seems to be that he is not to be protected.[125]

MORTGAGES

56. Definition.—A **mortgage** is a conveyance of real estate or of some interest therein, defeasible upon the payment of money or the performance of some other condition. The term *mortgage* is descriptive of an instrument by which the party executing it, called the *mortgagor*, conveys his property, either real or personal, to another party, called the *mortgagee*, as a pledge or security that on a certain day he will pay the mortgagee a sum of money or do some other act; and containing the proviso, that the conveyance shall be void if the money is paid or the act performed. If default be made by the mortgagor, the title to the property vests absolutely in the mortgagee, subject to a remaining right in the mortgagor, called his *equity of redemption*, to redeem the property upon payment of the proper charges, at any time prior to the foreclosure of the mortgage or the sale of the property by some other adverse process.

57. History.—Mortgages are of great antiquity in the law, and existed even in remote Egyptian times. Liens upon the property of another have prevailed at all times in the history of the civilized nations of the world.[126] *Mortgage* is the translation of *vadium mortuum*, or dead pledge, and was so called because the land pledged became

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123 9 Iowa 528, 531 (1859); 40 Iowa 659 (1875).
124 8 Wend. (N. Y.) 625, 626 (1832); 1 Green (N. J.) 43, 59 (1832).
125 27 Tex. 593 (1864).
126 Ping. Mort., Pt. 1, p. 1.

dead to the mortgagor upon his default, and vested absolutely in the mortgagee, in contradistinction to the *vivum vadium*, or living pledge, in which the land was given over to the mortgagee to hold until the issues and profits had paid the debt, in which case "neither the money nor the land dieth or is lost."[127]

During the feudal ages, mortgages were but little employed, because of the general restraint which existed upon the alienation or transfer of real property. Upon the removal of these restraints, mortgages sprang into general use, particularly about the period of the reign of Edward I. A *vadium mortuum* was then, and at common law is even to this day, looked upon as an absolute conveyance of the lands to the mortgagee, subject to be defeated by the payment of the debt upon the day appointed, but vesting indefeasibly in the mortgagee upon the happening of the default.[128]

58. Distinguished From Pledge. — A mortgage differs from a pledge in that a **pledge** is a mere deposit of property, always characterized by actual delivery, but with no intention to pass the title, whereas, a mortgage is a direct conveyance of the title, defeasible upon performance of the condition, but indefeasible if the property be not redeemed according to its terms; actual delivery of the property is not necessary.[129]

59. Distinguished From Conditional Sale. — A mortgage also differs from a **conditional sale.** The latter is a conveyance of the property subject to conditions which reserve to the grantor the right to refund the purchase money, and to claim a reconveyance, provided certain contingencies happen, but, unlike the case of a *mortgage*, there is not at any time after the conveyance has been made any subsisting *indebtedness* between the grantor and the grantee. There can be no such thing as a *mortgage* unless some indebtedness exists between the parties after the execution and delivery of the mortgage deed.[130]

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127 Coke Lit. 205 *a*.
128 Ping. Mort., p. 5.
129 4 Kent's Comm. 139.
130 22 Kans. 661–668 (1879).

PARTIES TO A MORTGAGE

60. The Mortgagor.—Any person who has the legal capacity to enter into contracts may execute a mortgage or authorize another to do it for him.[131] Persons who are under legal disabilities which prevent them from entering into valid contracts cannot execute a mortgage.[132] The mortgage of an *insane* person is presumptively invalid, though third persons who have given value for such a mortgage without knowledge of the insanity will be protected in equity to the extent of the money paid.[133] The mortgage of an *infant*, like all of his contracts, may be repudiated upon his coming of age. An infant, however, who fails within a reasonable time after coming of age to relinquish the property and reclaim the money paid on account of it, affirms the mortgage and renders himself legally liable for its payment.[134]

The mortgage of a *married woman*, at common law, was absolutely void; but she may now mortgage her separate estate, unless restrained by some clause in the instrument by which the separate estate was acquired or is held.[135] In the United States, the common-law rights and liabilities of married women have been greatly changed by statutes.[136] In most of the states, a married woman may, upon proper consideration, mortgage her separate property to secure the payment of her husband's debts, and such mortgages, in the absence of fraud on the part of the mortgagee, are seldom set aside by the courts.[137]

The power of *executors*, *guardians*, and other persons acting in a representative or fiduciary capacity, to mortgage property is a limited one, and depends upon statute both in England and the United States. They are generally authorized in particular emergencies to petition the courts for leave to mortgage in their representative capacity.[138] The subject is treated in detail under its appropriate title.[139]

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131 Ping. Mort. Sec. 348.
132 13 Wis. 425 (1861).
133 10 N. E. Rep. 270 (1887).
134 1 N. H. 73 (1817).
135 59 Me. 345 (1871); White & T. L. Cas. 324.
136 See *The Law of Husband and Wife.*
137 80 N. C. 166 (1879); 34 Ark. 17 (1879).
138 20 Kans. 153 (1878); Ping. Mort., Sec. 348.
139 See *The Law of Executors and Administrators; The Law of Guardian and Ward.*

Corporations have unlimited power, at common law, to mortgage, when not restrained by their charter or by statute.[140] Railroad companies, however, and other corporations to whom large powers and valuable privileges are given, have no power, without express authority from the legislature, to mortgage such of their property or franchises as are essential to the proper prosecution of their business.[141]

Agents entrusted with the power to sell and convey real estate have no implied power to mortgage, save where it is clear that the power to mortgage was absolutely necessary to the exercise of the power to sell and convey in the given case.[142]

61. The Mortgagee.—Any person who is legally capable of holding real estate may be a mortgagee.[143] An *infant* who takes a mortgage will be bound by its conditions, and if the mortgagor desire to redeem, the court will appoint some person to act for the infant in the proceedings.[144] A *married woman*, at common law, may be a mortgagee, but her power in this regard is now very generally regulated by statute in the various states.[145] *Aliens* have the power to hold and enforce a mortgage.[146] A mortgage to a *partnership* in the firm name is valid.[147] *Corporations* may be mortgagees, unless restrained by their charters.[148]

62. Joint Mortgagees.—A mortgage may be executed to two persons jointly. A mortgage given to secure a joint debt creates a joint tenancy in the mortgagees, and payment to either mortgagee satisfies the mortgage.[149] Upon the death of a joint mortgagee, the right to sue for the debt or enforce the mortgage vests exclusively in the survivor, who is entitled to one-half of the proceeds in his own right, and to hold the other half in trust for the estate of his deceased joint tenant.[150] Where, however, the mortgage is given to

140 101 U. S. 622 (1879).
141 15 Ohio St. 21 (1864).
142 6 Cush. (Mass.) 117 (1853).
143 Jon. Mort., Sec. 131.
144 110 Mass. 311 (1872).
145 12 Mass. 16 (1815).
146 9 Wheat. (U. S.) 489 (1824).
147 47 Ohio 306 (1890).
148 1 Watts (Pa.) 385 (1833).
149 7 Mass. 131 (1810).
150 32 N. J. Eq. 678 (1880).

two persons, not to secure a joint debt, but to secure the several debt of each, they hold as tenants in common, not as joint tenants, and the survivor can enforce only his own individual claim.[151]

CONSIDERATION

63. Mortgages are usually given as security for the payment of a sum of money. They are, however, sometimes conditioned for the support and maintenance of the mortgagee, or even given as security for the faithful performance of specified duties by the mortgagor.[152] When given for the payment of money, the debt intended to be secured usually represents either a preexisting indebtedness or an indebtedness incurred contemporaneously with the execution of the instrument, the precise amount of which is set forth in the mortgage.[153] It frequently happens, however, that mortgages are given to secure future advances of money which are to be made by the mortgagee, the exact amount of which cannot be known in advance, and therefore cannot be inserted in the mortgage.[154] In some of the United States, out of a regard for subsequent purchasers from the mortgagor, statutes have been enacted which provide that such mortgages shall be null and void as to third parties, unless the amounts of such future advances, and the times when they are to be made, be specifically set forth in the mortgage. There are regulations, in other states, that no such mortgage shall be a lien except from the time the loan or advance is actually made.[155]

64. Covenants.—Mortgages given as security for the payment of money borrowed on the credit of real estate usually contain **covenants** for the payment of interest on the loan, for the payment of taxes upon the property conveyed, and for the placing of insurance upon the buildings.

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151 55 Me. 520 (1868.)
152 29 Kans. 765 (1883).
153 71 Pa. 219 (1872).
154 5 Conn. 442 (1825).
155 Jon. Mort., Sec. 366.

EQUITY OF REDEMPTION

65. The doctrine of the mortgagor's **equity of redemption** arose from the view which English courts of equity as distinguished from the courts of law took of the *vadium mortuum*. They promulgated the doctrine that the forfeiture of the mortgagor's land upon his failure to pay the debt upon the very day appointed in the mortgage, was nothing short of a penalty, and as such should be relieved against. They held that mortgages should be regarded as the Roman law had regarded them, as mere securities for the payment of the debt. During the reign of Charles II, the equitable doctrine was firmly established that the mortgagee held the lands, although forfeited at law, as a trust, and that the mortgagor, upon payment of the debt and all equitable charges, had the right to redeem the land at any time before the foreclosure of the mortgage. This right of the mortgagor to redeem the land, after the estate had become vested at law in the mortgagee, was called his *equity of redemption*.[156]

The equity of redemption being intended for the protection of the mortgagor, courts of equity were soon required, by the artifices, connivance, and oppression of the mortgagor's creditors, aimed at the nullification of the doctrine, to enunciate a still further principle of scarcely less importance which has survived to the present time, namely, that the mortgagor cannot, by any words in the original mortgage, preclude himself from the right to redeem his property at any time up to the actual foreclosure of the mortgage. "Once a mortgage always a mortgage," became, and still remains, one of the most important maxims of the law. Any agreement or stipulation of the parties, made at the time of the execution of the mortgage, waiving or barring the mortgagor's right of redemption, is void.[157] When a mortgage takes the form of a deed absolute, with a separate agreement to reconvey executed simultaneously with the principal instrument, a provision in the separate agreement that if the debt be not paid within the time stipulated the

[156] Ping. Mort., Secs. 7, 8; Story Eq., Sec. 1,013; Jon. Mort., Sec. 6.

[157] 29 Ark. 544 (1874); 96 U. S. 332 (1877).

agreement to reconvey shall be void and the deed become absolute "with no right of redemption," is null and void, and the grantee will be entitled to redeem at any time up to the time of foreclosure.[158]

66. Waiver.—But a mortgagor may, by an agreement executed *subsequently* to the mortgage, and founded upon a new and sufficient consideration, waive his equity of redemption. An agreement to reconvey executed at the same time as an absolute deed may subsequently be cancelled so as to give an absolute title to the grantee, where the transaction is conducted with fairness both as between the parties and as against the creditors of the mortgagor, and where the rights of no third parties have intervened.[159]

67. Purchasers of the Equity of Redemption.—A purchaser of mortgaged premises *who expressly assumes the payment of the mortgage* thereby makes himself personally liable for the payment of the debt, and the recourse of the mortgagee is not confined to proceedings on the mortgage alone. In such a case, the original mortgagor stands in the position of a surety for the payment of the mortgage, and may be sued as such. The purchaser is the principal debtor, but the mortgagee may at his election treat both as principal debtors and obtain a personal decree against both.[160]

A purchaser who simply buys subject to an existing mortgage assumes no personal liability. He is considered, in the absence of other evidence, simply to have become the purchaser of the equity of redemption.[161] He is, indeed, interested in the payment of the mortgage as being an encumbrance upon his land, but he is not considered to have entered into any obligation on his part to pay the debt, and if he part with his title, he has no longer any interest in the mortgage.[162] To create personal liability in such a purchaser, the deed of conveyance must contain words which clearly import the assumption of an obligation to pay the

158 1 Allen (Mass.) 107 (1861).
159 17 Pick. (Mass.) 213 (1835).
160 47 N. Y. 236 (1872); 115 U. S. 505 (1885).
161 58 N. H. 380 (1878).
162 124 Mass. 254 (1878).

debt.[163] The rule, however, is universal, whether the purchaser expressly assume the payment of the mortgage or only take subject to the mortgage, that in either case the land itself is the primary fund for the payment of the debt, and is as effectually charged with the encumbrance of the mortgage as if the purchaser had himself made the mortgage.[164]

A purchaser of the equity of redemption at a sheriff's sale cannot call upon the mortgagor to pay off the mortgage. He takes his purchase subject to the mortgage. It follows that he incurs no personal liability to the mortgagee, who must collect his debt out of the land itself.[165]

THE MODERN MORTGAGE

68. In England, a *mortgage* is one thing at law, and another in equity. At law, a mortgage is an *estate;* in equity, it is merely a *security*.[166]

In the United States, there is not, as in England, a distinct, harmonious doctrine or system governing the subject of mortgages, but the mortgagor's equity of redemption is recognized.[167] In most of the states, the English doctrine prevails that a mortgage has the dual character of being a conveyance of the estate at law and a mere security for the debt in equity, with reciprocal rights in the parties which are enforceable in the appropriate courts of law or of equity. In such states, as against the mortgagor, the mortgage is held to pass the legal title to the mortgagee, who is entitled to immediate possession, to be held subject to the mortgagor's exercise of his equity of redemption. If the equity of redemption be lost by the foreclosure of the mortgage, the estate vests absolutely in the mortgagee.[168]

Other states have abolished the distinction between courts of law and courts of equity, and have established a single statutory action or remedy in which the legal and equitable rights of the parties are administered at the same time and

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163 29 Barb. (N. Y.) 524 (1859).
164 38 Iowa 112 (1874).
165 10 Paige (N. Y.) 249 (1843).
166 Jon. Mort., Sec. 11.
167 Ping. Mort., Secs. 9–27.
168 5 Metc. (Mass.) 1 (1842); 65 Pa. 278 (1870).

by the same tribunal.[169] In such states, the doctrine is practically universal that the mortgagee takes no estate of any kind in the premises, but only a lien on them as a security for his debt, and can only acquire possession of the premises by a foreclosure and sale.[170] In some states, even where the mortgagee has acquired the legal title by foreclosure and sale, he is permitted to retain title only so long as may be necessary for him to pay his debt out of the rents and profits of the land.[171]

69. Summary.—Reviewing what has been said, it will be apparent that the following general observations may be made of the views taken of the modern mortgage by the courts of England and of this country.

1. *At law*, both in England and in *most* of the United States, a mortgage is a conveyance of the legal title, as against the mortgagor; but a mere security for the debt, as against all other persons.

2. *In equity*, both in England and in *most* of the United States, a mortgage is merely a security for the debt, not only as against third persons, but also as against the mortgagor himself.

3. In *some* of the United States, a mortgage is never, under any circumstances, anything but a mere security for the debt.

KINDS OF MORTGAGES

70. Power-of-Sale Mortgages.—In England, and in many jurisdictions of the United States, the practice exists of inserting in the ordinary form of mortgage a **power of sale,** that is, an authority to the mortgagee to foreclose the mortgage or to sell or convey the property upon default by the mortgagor; and a provision is generally coupled with it, for payment of an attorney's fee.[172] Where the mortgage contains no such authority, power to sell upon the mortgage is conferred by statute, both in England and in most of the

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169 Ping. Mort., Secs. 9–27.

170 Code of Ga. (1873), Sec. 1,954; 36 Mich. 364 (1877); 2 Barb. Ch. (N. Y.), 119 (1847).

171 1 Houst. (Del.) 320 (1853); 52 Miss. 271 (1876); 10 Mo. 229 (1846).

172 3 Pick. (Mass.) 484 (1826); Jon. Mort., Sec. 1,722; 23 Beav. (Eng.) 418 (1857).

United States.[173] A sale under such a mortgage defeats the mortgagor's equity of redemption.

71. Deeds of Trust.—A **deed of trust** is a conveyance of property in trust for the payment of a debt, or the fulfilment of some other obligation, with a power in the trustee, in the event of the grantor's default, to sell the property and apply the proceeds to the payment of the debt. A deed of trust cannot be distinguished from a power-of-sale mortgage, except that the title to the property and the power of sale is vested in a third person, and not directly to the mortgagee.[174]

72. Form of Mortgage.—In the usual form of mortgage, the clause of conveyance and the clause of defeasance are contained in the same instrument. But an ordinary deed of conveyance, with a separate agreement to reconvey the premises upon payment of a sum of money or the performance of some similar condition, will constitute a legal mortgage when the two instruments are executed, sealed and delivered simultaneously, and are intended to be regarded as one transaction.[175]

A mortgage is usually accompanied with a bond or note for the debt intended to be secured, although a simple covenant is inserted in the mortgage for the payment of the money. The absence, however, either of a bond or note or of a covenant in the mortgage, will not make the instrument any less a mortgage.[176]

Legal mortgages, in their ordinary common-law form, are couched in language which is verbose, technical, and antiquated.[177] To obviate this, forms in which the mortgage is reduced to its shortest possible terms have been provided by statute in many of the United States.[178]

73. Equitable Mortgages.—It is the intention of the parties, and not the form of the instrument, which determines whether a given transaction is a mortgage. Every

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[173] 17 Cal. 589 (1861).
[174] Jon. Mort., Sec. 62.
[175] 1 Metc. (Mass.) 117 (1840).
[176] 4 Kent's Comm. 145.
[177] Jon. Mort., Sec. 61.
[178] See *Book of Forms*.

deed and conveyance which, though lacking the formal characteristics of a legal mortgage, is manifestly intended by the parties to operate as a mortgage, will be given that effect by courts of equity. In a technical sense, therefore, mortgages are of two classes: *Legal mortgages*, such as have just been described, and *equitable mortgages*, of which there are as many kinds as there are various ways in which parties may contract for security by pledging their interests in property.[179] Thus, an ordinary legal mortgage, unenforceable at law because of the omission of some formality in its execution, will be regarded as an equitable mortgage, and its lien rendered enforceable by special proceedings in a court of equity.[180]

An absolute conveyance of land accompanied by a separate agreement or clause of defeasance which, because both instruments were not under seal and executed and delivered at the same time, would not be a legal mortgage, may be converted into an equitable mortgage by parol proof that the real intention of the parties was to permit a reconveyance to the grantor upon performance of some condition.[181] If a person having the right to purchase land agree with a third person that the latter shall pay the purchase money and take the title in his own name until he is reimbursed, the transaction, as between such persons, is an equitable mortgage.[182] In England, where there is no such system of recording deeds and conveyances (except in the counties of York and Middlesex), and where the only evidence of title to property is the actual possession of the title deeds, it is held that the deposit of title deeds with a third person amounts to the creation of an equitable mortgage. In the United States, in order to produce such an effect, some independent equity must be shown apart from the mere deposit of the deeds.[183]

74. What Passes by the Mortgage. — Where a building is mortgaged, the land essential to the use of the building passes by the mortgage, if it appear that such was

179 Jon. Mort., Sec. 162.
180 Jon. Mort., Sec. 168.
181 32 Ill. 476 (1863).
182 31 Cal. 321 (1866); 75 Pa. 483 (1874).
183 4 Dill. (U. S.) 314 (1876); 3 Pa. 233 (1846).

the intention of the parties.[184] Where land is mortgaged, such fixtures and improvements pass by the mortgage, without any special mention of them, as are necessary to the beneficial enjoyment of the land, and without which, the realty would cease to be valuable.[185] For example, a mortgage of land will cover cupboards, doors, windows, partitions, grates, ranges, and other like fixtures, but not gas fixtures, chandeliers, stoves, hangings, book cases, curtains, and the like.[186] Fixtures which are annexed to the land *subsequently* to the execution of the mortgage are not affected by the lien of the mortgage, unless their detachment would injure the property, and thereby diminish the mortgagee's security.[187] A house erected merely for temporary use does not come within the lien of a mortgage upon the land.[188]

RIGHTS AND LIABILITIES OF THE PARTIES

75. In the United States, the respective rights and liabilities of the mortgagor and mortgagee, both as between themselves and as respects third parties, depend, in each state, upon whether the courts of that state regard it as a conveyance of the legal title, or merely as a security for the debt.

76. As to the Mortgagor.—In those states where a mortgage is never, either at law or in equity, regarded as anything but a *mere security*, the practical result to the mortgagor is that he, and not the mortgagee, is entitled to possession until the mortgage is foreclosed and the property is sold and bought in by the mortgagee; unless, indeed, prior to that time, the mortgagor voluntarily place the mortgagee in possession; in which case, the latter's possession will be lawful.[189]

The mortgagor is considered to be the absolute owner of the property, the latter being subject to the mere charge or lien of the mortgage.[190] If the mortgagee accept payment of the debt from the mortgagor after breach of the condition

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184 14 Wis. 683 (1861).
185 51 Barb. (N. Y.) 48 (1868).
186 Ping. Mort., 436, 437.
187 78 Ky. 224 (1879).
188 46 Ill. 156 (1867).
189 46 Mich. 107 (1881).
190 7 Mass. 138 (1810); 11 Johns. (N. Y.) 534 (1814).

of the mortgage by the latter, this will be construed into a waiver of the condition, and have the same effect as performance of the condition; payment of the debt will extinguish the mortgage.[191]

This is not necessarily so in the states where a mortgage is regarded as a conveyance of the legal title; the mortgagor is there likewise entitled to possession of the premises, but only as against third persons. A mortgagor in possession has, as to strangers, all the remedies of an owner, and may sue any one who interferes with his enjoyment of the land.[192] He may lawfully dispose of the products of the land;[193] and he may lease the property, or sell it.[194] In the United States, his widow is entitled to dower in his equity of redemption;[195] but in England, where dower is considered a mere legal right, the widow is not dowable of an equity of redemption.[196] The mortgagor's interest in the property is subject to attachment and sale upon execution by his creditors, either before or after he makes default in the mortgage.[197]

77. As *against the mortgagee*, however, the mortgagor (even in states where the mortgage is considered a conveyance of the title) is not entitled to possession of the premises, unless by force of some express covenant or agreement to that effect. If he be in possession of the premises without the express assent of the mortgagee, he is considered a mere tenant at will, and may be ejected without notice by the mortgagee.[198] He may, however, in some cases, be entitled to possession by implication, as where the mortgage provides that he shall keep and cultivate a farm and deliver half of the proceeds to the mortgagee;[199] or where the provision is that the mortgagee may enter after default.[200] A mortgagor who is permitted by the mortgagee to remain in possession may make improvements and take the rents and

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191 3 Chandl. (Wis.) 83 (1850).
192 51 Me. 556 (1863).
193 55 Me. 494 (1867).
194 28 Mo. 142 (1859).
195 5 Johns. Ch. (N. Y.) 452 (1821).
196 1 Bro. Ch. Cas. (Eng.) 326 (1783).
197 4 Pick. (Mass.) 253 (1826).
198 2 Conn. 1 (1816).
199 11 Pick. (Mass.) 475 (1831).
200 9 Ala. 633 (1846).

profits for his own use in the same manner as before the mortgage was executed.[201] Upon his death, his widow is entitled to remain in possession and take the rents and profits until the mortgagee interferes or forecloses the mortgage.[202]

The mortgagor cannot make any lease of the premises that will be binding on the mortgagee without the latter's assent; unless the mortgagee in some way recognize the tenancy, he has the right, upon the mortgagor's default, to enter the premises and treat the lessee as a trespasser.[203] Where there is a lease in existence at the time the mortgage is executed, the rule is universal, both in the United States and in England, that the mortgagee is entitled to all rent which accrues subsequently to his giving notice that he desires the same to be paid to him.[204]

78. If, in the states where the mortgage is considered a conveyance of the title, the mortgagor fail to pay the mortgage debt until after the condition of his mortgage has been broken, the law is that the mortgagee is not necessarily divested of his legal title to the premises by such payment, and it may be necessary for the mortgagor to resort to a court of equity for a release or reconveyance of the premises. This, it will be remembered, is not the doctrine of those states where the mortgage is viewed merely as a security for the debt.[205]

A mortgagor cannot compel the mortgagee to accept payment of the mortgage debt before it is due, unless, perhaps, he tender all the interest up to the date fixed by the mortgage for payment.[206] In England, when the mortgagee, upon maturity of the debt, does not demand payment, the custom is to allow the mortgagee a margin of six months' notice of the mortgagor's intention or desire to pay off the mortgage. In the United States, no such general rule obtains, although there are local customs in almost all the

201 78 Ky. 496 (1879).
202 63 Ala. 456 (1879).
203 16 Cal. 580 (1860).
204 111 U. S. 242 (1883).
205 9 Allen (Mass.) 522 (1865).
206 7 Conn. 377 (1829); 25 La. Ann. 438.

states which provide for some notice to be given the mortgagee.[207]

It is held not to be essential to a mortgagor's right to redeem, that he should exercise the right within the time limited in the mortgage. The right to redeem is a subsisting right up to the time of foreclosure unless it be sooner barred by lapse of time.[208]

79. A mortgage will be presumed to have been paid where the mortgagor has been permitted to remain in possession for a period of twenty years without making any payments.[209] This presumption is one of law, and is conclusive, unless rebutted by proof of some payment of principal or interest, or of some admission of an existing indebtedness.[210] The period of twenty years is not adopted as a fixed and positive limit of right, but merely as an equitable rule, after the analogy of statutes of limitations. In several states in which the time for bringing real actions is less than twenty years, a corresponding period is adopted in equity as the period within which a mortgage must be foreclosed, or the right of redemption exercised.[211]

When the mortgage debt has been fully paid, the usual course, in order to release the lien of the mortgage, is for the mortgagee either to execute a formal deed of reconveyance to the mortgagor, or to enter satisfaction upon the margin of the record of the mortgage in the office where it has been recorded.

80. Personal Liability of Mortgagor to Mortgagee. A mortgagor does not become personally liable to the mortgagee for the amount secured by reason of the mere execution of the mortgage. To make him personally liable, the mortgage must contain either an express covenant on his part to pay the debt or an unqualified admission or recital of the indebtedness.[212] Usually, a mortgage is accompanied by a bond or judgment note for the debt, and this sufficiently

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207 Jon. Mort., Sec. 890.
208 32 Ill. 476 (1863).
209 12 N. Y. 394 (1855).
210 8 Pa. 520 (1848).
211 25 Vt. 324 (1853); 42 Iowa 260 (1875).
212 4 Cal. 294 (1854).

establishes the mortgagor's personal liability. The statutes in some of the United States expressly provide that when a mortgage contains no express covenant to pay the debt, and is not accompanied by a separate obligation in the nature of a bond or note, the remedy of the mortgagee is confined exclusively to the land covered by the mortgage.[213]

81. It is always the right of the mortgagor to have the mortgaged property applied first to the payment of the debt, so far as the same may be necessary to his protection against personal liability. This is particularly the case where the mortgagor has conveyed his equity of redemption to a third person who has assumed the payment of the mortgage debt. Where several pieces of land are included in one mortgage, the mortgagor cannot reasonably complain if the mortgagee release one or some of them for the benefit of those who may own the equity of redemption therein, if the mortgagee himself be satisfied to rest upon the security thus diminished. On the other hand, the mortgagor is entitled to complain if, having provided the mortgagee with sufficient security, the latter dispose of the security whereby the mortgagor is subjected to personal liability for the debt.[214] It is well settled, however, that if the foreclosure of the mortgage do not result in the full payment of the debt, the mortgagee may sue the mortgagor in a separate action for any balance which may be due him.[215]

82. As to the Mortgagee.—Where a mortgage is considered to be the conveyance of the legal title, the mortgagee is entitled to immediate possession of the premises, unless restrained by some express clause to the contrary in the mortgage. In the absence of such restraint, he may at any time enter and take possession of the premises, and if possession be refused, he may sue the mortgagor as a trespasser, or recover possession by an action of ejectment.[216]

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213 8 Minn. 232 (1863).
214 136 Mass. 459 (1884).
215 115 U. S. 505 (1885).
216 2 Mass. 493 (1807).

A mortgagee, however, *not in possession of the premises*, is not regarded as the owner of the property, even as against the mortgagor, except for the maintenance of foreclosure proceedings or other suit to enforce his rights.[217]

Whether the mortgage be considered a conveyance of the legal title or a mere security, a mortgagee's interest in the property is personal property, and upon his death vests in his executor or administrator, by whom alone it can be assigned, released, or foreclosed.[218] A gift, therefore, by will of a mortgage is a bequest of personal property which carries with it no interest in the land mortgaged.[219]

A mortgagee's interest in the property cannot be levied upon and sold on execution by his creditors. If it were otherwise, the mortgagor's right to exercise his equity of redemption might be seriously embarrassed, if not absolutely endangered. The law, therefore, may be said to be universal that the mortgagee has no interest in the mortgaged land which is subject to attachment by his creditors.[220]

83. As *against the mortgagor*, a mortgagee is regarded in law as a purchaser of the land to the amount of his claim, and therefore, is entitled to all the protection which the law extends to *bona fide* purchasers. A mortgagee will not be affected by the fraud of his mortgagor in the acquisition of the latter's title.[221]

As against *subsequent* mortgages, the rule is that if the mortgagee hold other securities besides the mortgage from which he may realize his debt, he may be compelled in equity to exhaust his other securities before resorting to the mortgage for the satisfaction of his debt. If the first mortgagee hold a mortgage on two parcels of land, and a second mortgagee hold a mortgage on but one of these parcels of land, the first mortgagee may be compelled to exhaust the proceeds of the one piece of land before appropriating the piece of land upon which the mortgage of each is secured.[222]

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217 15 N. H. 412 (1844).
218 56 Ala. 461 (1876).
219 124 Mass. 111 (1878).
220 13 Mass. 206 (1816).
221 47 Me. 507 (1859).
222 9 Humph. (Tenn.) 568 (1848).

This rule, however, being a purely equitable one, will not be enforced when its effect would be to work prejudice to the first mortgagee.[223] It will not be applied, for example, where one of the pieces of land covered by his mortgage is a homestead, and the second mortgage covers the tract which is not a homestead.[224] If the first mortgagee release the mortgagor from any personal liability contracted for in the mortgage, he thereby diminishes the security of a subsequent mortgagee, and his lien will be held to be subordinate to the lien of the latter.[225]

REGISTRATION OF MORTGAGES

84. Mortgages are required to be **registered** and **recorded** in some office appointed for the purpose, to which the public may have access; but the parties executing the mortgage, their heirs and devisees, as well as all others who have actual notice of its existence before acquiring title, will be bound whether the mortgage be recorded or not.[226]

In England, except in the counties of York and Middlesex, there is no general system of recording deeds and conveyances. The only security which a purchaser of lands has for the validity of his grantor's title is the possession of the title-deeds which establish it. In all transactions of real estate, the original deeds go with the property as evidences of title; a transaction cannot be made without them.[227]

85. In the United States, there exists a complete system of registration, which dispenses with the necessity for the production of the title-deeds. A prospective purchaser, by consulting the proper public records, may ascertain, and it is his duty to ascertain, the state of his grantor's title.[228] Every conveyance of land must be recorded, and, when recorded, is notice to all the world, not only of its existence and priority, but also of its contents. One who purchases land in good faith without notice of a prior *unrecorded* mortgage, takes the property discharged of the lien of such

223 4 S. W. Rep. 521 (1887).
224 23 Minn. 74 (1876).
225 24 Wis. 346 (1869).
226 85 Pa. 364 (1877); 29 Md. 211 (1868).
227 See *subtitles* Deeds, Recording, *supra*.
228 1 Lans. (N. Y.) 376 (1872).

mortgage. A recorded mortgage takes precedence over an unrecorded mortgage, even though the latter be executed first.[229] When a mortgage is once recorded, the mortgagee will be protected against any subsequent dealings of the mortgagor with the premises mortgaged. For example, if the mortgagor subsequently sell a right of way over the land, such right of way will be subject to the title of the mortgagee, and a sale under the mortgage will discharge it, together with the deed by which it was created.[230]

By statute, in most of the United States, mortgages must be recorded *within a stipulated time*, in order to preserve their priority. The record of a mortgage dates from the moment it is left on file for record.

In the case of deeds absolute accompanied by a separate agreement to reconvey, which, as before stated, are legal mortgages, it is generally provided by statute, that in order that such instruments may operate as mortgages against third persons, the separate defeasance must be recorded; otherwise, the title of the grantor will be postponed to that of a *bona fide* purchaser of the premises from the mortgagee without knowledge of the agreement to reconvey.[231]

The object of registration is to give notice of the existence of the mortgage; it follows that all persons who already know of the mortgage do not require additional notice, and that as to such persons registration of the mortgage is not necessary. A subsequent purchaser of the land who has notice of a prior unrecorded mortgage is as much affected by his private knowledge of it as he would be had the mortgage been recorded.[232]

ASSIGNMENT OF MORTGAGES

86. In jurisdictions where a mortgage is held to be the conveyance of the legal title, the entire interest of the mortgagee may be assigned to a third person, and the latter will succeed to all the mortgagee's rights as well as to all

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229 81 Ill. 281 (1876).
230 38 Pa. 76 (1860).
231 Jon. Mort., Sec. 253.
232 18 N. J. Eq. 481 (1867).

of his liabilities. To be valid, such an assignment must be executed by deed under seal, and acknowledged, delivered, and recorded with the same solemnity as attended the original conveyance.[233] An assignment of a mortgage, though endorsed on the mortgage-deed and delivered and recorded with it, will, if not executed under seal, convey only an equitable interest. It will not pass the legal estate, though it will authorize the assignee to enforce the mortgage in equity.[234]

It is as essential to record the assignment of a mortgage as it is to record the mortgage itself. As respects the mortgagor or his heirs or personal representatives, registration of the assignment is immaterial. Such parties are not bound to consult the record to ascertain whether the mortgage has been assigned; to charge them with notice of an assignment, something more is necessary than the registration of the instrument.[235] It is the duty of the assignee of a mortgagee in order to protect himself against payments made to the mortgagee by the mortgagor, to give the latter express notice of his acquisition of the title. The purpose of this rule is to save the mortgagor the necessity of examining the record every time he makes a payment to his mortgagee.[236] This rule does not extend to purchasers of the equity of redemption, who are bound to take notice of all assignments recorded prior to taking title.[237]

87. The rule is practically universal that a *bona fide* assignee for value of a mortgage, which is secured by a negotiable instrument not yet due, takes the assignment free from any equities existing between the parties to the mortgage at the time of the assignment.[238] The rule is equally settled that if the note be overdue at the time of the assignment, the assignee will take subject to the equities.[239]

In some states, a bond which accompanies the mortgage is not a negotiable instrument, and the assignee of a bond

[233] 12 Gray (Mass.) 53 (1858).
[234] 3 N. J. Eq. 14 (1834).
[235] 49 Pa. 282 (1865).
[236] 47 N. Y. 307 (1872).
[237] 103 N. Y. 556 (1886).
[238] 6 Allen (Mass.) 86 (1863).
[239] 29 Me. 160 (1848); 15 Gray (Mass.) 520 (1860).

and mortgage takes subject to all the equities which prevailed between the parties at the time of the execution of the assignment.[240] In some states, it has been held that such an assignee will be bound by equities existing at the time of the assignment between the mortgagee and third persons.[241] An assignee of a mortgage is never affected by equities of the original parties arising subsequently to the assignment, which had no existence or were simply possibilities at the time of the assignment.[242]

240 186 Pa. 431 (1898). 241 22 N. Y. 535 (1860). 242 90 Pa. 53 (1879).

THE LAW OF PROPERTY

(PART 4)

PERSONAL PROPERTY

1. As hereinbefore explained, all property is either real or personal, the latter being defined "as the right or interest which a man has in things personal." The term **personal property** is applied to all those objects and rights, classified as corporeal or incorporeal, over which ownership may be exercised, which do not concern land, and also to all interests in land that are of certain and fixed duration, designated *chattels real* as distinguished from *chattels personal;* the latter term is used convertibly with *personal property* and *personalty* to designate all property that is not real estate, and comprises, "properly and strictly speaking, things movable, which may be carried about by the owner, and which accompany him at law wherever he may go."[1]

CORPOREAL PERSONAL PROPERTY

CHATTELS PERSONAL

2. Chattels personal, for the present purpose, are further divided into things *animate* and things *inanimate;* that is, into such things, the subject of ownership, which can move themselves, and those things which are movable only through the application of external force.[2]

3. Of the **animate kind** are all animals having in themselves the power of motion; except human beings, which, since the abolition of slavery, can no longer be the subject of ownership.

[1] Schoul. Per. Pr., Vol. 1, Sec. 9.

[2] *Ibid.*, Sec. 5.

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Animals are distinguished into such as are tame, and such as are wild. The *tame class* includes all domestic animals, such as horses, cattle, sheep, and poultry, and are the subject of absolute property. *Wild animals*, on the contrary, while they are at large, belong to no one, although the state exercises a general ownership over them for the benefit of its citizens.[3] But, when wild animals are dead, or in the possession of any one, property rights may be had in them. When killed, they belong to the owner of the land on which they were killed, unless the one who killed them had a right to be on the premises and to appropriate them to his own use.[4] Wild animals in captivity belong to the one who keeps them; if they regain their liberty, they are no longer his property but belong to the first taker. These rules likewise apply to property in fish.

Bees are wild animals. When they are hived, a person may have a qualified interest in them; if they fly away, they remain his so long as he can keep them in sight and has the power to pursue them; beyond that his property ceases.[5]

4. Of the **inanimate class** are numerous and important rights and objects which pertain to the person of man, a full description of all of which it is unnecessary to give. Some, however, are of such universal interest that particular notice is accorded them here.

5. Money.—The common medium of exchange among civilized nations is called **money**. In a technical sense, money means coined metal, usually gold or silver, upon which the government stamp has been impressed to indicate its value. In a more general sense, it imports any circulating medium in general use as the measure and representative of value, which serves the purpose of coin in its absence or concurrently with it.

6. Currency means money only, but it includes both coined and paper money. The only practical distinction

[3] 2 Black. Comm. 390.
[4] 11 H. L. C. (Eng.) 621 (1865).
[5] 15 Wend. (N. Y.) 550 (1836).

between paper money and coined money, as currency, is that when offered in payment of a debt, coined money must generally be received, while paper money may be refused, at the option of the creditor. But a payment in either, if accepted, is a payment in money.

7. The **lawful currency** of the country is that which may be tendered and must be received in the discharge of debts or other obligations.[6] It includes all bank notes that are issued for circulation by authority of law, and are in actual and general circulation at par with coin, as a substitute for or interchangeable with it; that is, such bank notes as actually represent dollars and cents, and are paid and received for dollars and cents at their legal standard value; it does not include all coins.[7] Foreign coins are not currency, nor are the trade dollars, coined some years ago. Whatever represents less than the standard value of coined dollars and cents at par does not properly represent dollars and cents and is not money, and is not properly included in the word *currency*.

8. The term **specie** is applied to a coin, or coins, of gold, silver, copper, or other metal, issued under the government stamp declaring its, or their, denomination as current money.[8]

9. **Legal-tender currency** means money that may be validly offered in payment of a debt.[9] In the United States, no foreign coins are a legal tender; but domestic gold coins, silver coins for any amount not exceeding five dollars (in one payment), minor coins to the amount of twenty-five cents, and United States notes in payment of all debts, public and private, except for duties on imports and interest on the public debt, are legal tender. Demand treasury notes and interest-bearing treasury notes are also legal tender, except in payment of notes issued by a bank.[10]

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[6] 1 Ohio 189–204 (1824).
[7] 47 Wis. 559 (1879).
[8] Stand. Dict.
[9] Anderson's Law Dict. 1,019.
[10] R. S. Title XXXIX, Secs. 3,584–90 (1857–1875).

10. **Ships and vessels** are "chattels personal of a corporeal character; no other class is more important in a legal point of view; but, while the law of shipping is in many respects peculiar, and while ships and vessels are undoubtedly personal chattels," the rules by which the title to them is acquired and transferred are similiar to those which govern the acquisition and transfer of title to real property.[11]

The **rolling stock of a railway,** such as locomotive engines and cars, is considered personal property, but the road bed and rails are realty.

INCORPOREAL PERSONAL PROPERTY

11. The term **incorporeal personal property** includes all the various rights which a person has in and to corporeal personal property, which at the time is out of his possession, but of which he may recover possession; or, for being deprived of which, he may recover damages in an action at law. These rights are usually called *choses in action* and include (1) those which arise out of a contract, either express or implied; (2) those which arise out of the wrongful act of another, by which the claimant is deprived either of the possession or full use of his property, or by which his person is injured.

12. To the first class, that is, the rights that arise out of contract, belong annuities, salaries, wages, fees, pensions, insurance policies, bills, notes, and checks, the interests of the partners in a firm, stocks in a corporation, bonds, and the like, which are treated under appropriate titles.[12] A seat in a stock exchange, or board of trade, is considered incorporeal personalty, but the purchaser takes it subject to the rules and regulations of the association.[13]

13. To the second class of incorporeal personal property belong all the various rights that grow out of wrongful acts done to the property or person of another. They are usually

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[11] Schoul. Per. Pr., Vol. 1, Sec. 55, citing 16 Mass. 339 (1820).

[12] 2 Black. Comm. 386-397.

[13] 15 Fed. Rep. 789 (1883); 94 U. S. 523 (1876).

not reckoned with personal property, because, at common law, they are not transferable, but purely personal to the one injured and can only be enforced by him. Now, by statute, in many states, some of these rights are enforceable by the executor or administrator of a decedent, or by his wife, children, or other relatives. These rights are known generally as *claims* or *demands*.

14. There is a third class of incorporeal personal property, which partakes of the nature of both the others. It consists of peculiar personal rights, which are usually only brought into notice by the necessity for protecting them from wrongful interference, and which, though inherent in corporeal objects, are, nevertheless, distinct and separate, though inseparable from the latter. They are, however, transferable, and any one who succeeds to the title of the original owner may receive damages for an injury done them. Such are the various forms of literary property, copyrights, the property in names, trade names, trade-marks, and patents.[14]

TITLE TO PERSONAL PROPERTY

BY ORIGINAL ACQUISITION

15. Title to personal property may be acquired by (1) *original acquisition;* (2) *involuntary transfer;* (3) *voluntary transfer.* Title by **original acquisition** may arise by occupancy, as in the case of lost or abandoned property, or the confusion of goods.

16. Lost Property. — The finder of a lost article acquires no title against the real owner; but, though he does not, by such finding, acquire an absolute ownership of it, he has such property in it that he may retain it against all but the rightful owner.[15]

The loss of property depends upon something more than the knowledge or ignorance, the memory or want of memory,

[14] See *The Law of Patents, Copyrights, and Trade-Marks.*

[15] 1 Stra. (Eng.) 505 (1795).

of the owner as to its locality at any given moment. To *lose* is not to place or put anything carefully and voluntarily in the place intended and then forget it. It is casually and involuntarily to part from the possession; the thing is then usually found in a place under such circumstances as prove to the finder that the owner's will was not employed in placing it there.[16]

17. The *title* which a finder has to lost property is not affected by the place in which it is found;[17] an employe has a right to lost property found on the premises of his employer;[18] money found by a servant in a hotel belongs to him and not to the proprietor, in the event of its being unclaimed; a lost article found by a conductor in a car belongs to him and not to the company which owns the car.[19] But the doctrine of these cases is limited in a recent English decision, which holds that where a lost article is found by one person on premises of which another person is the owner and the exclusive occupant, and to which he has not invited the public, the right to the thing so found belongs to such occupant of the premises and not to the finder.[20]

While the finder of lost property may retain it as against every one but the owner, when the latter makes demand, he must surrender it; and, if he dispose of the property in any way, even by delivery to a wrongful claimant, he is liable to the owner for its value.[21] The claimant must prove to the satisfaction of the finder that he is the owner, or the finder will not be obliged to give it up. As the latter is bound to hold it for the true owner, and is liable in case of misdelivery, the law makes it his duty as well as his right, even where there is no reward, to find the right owner and see that he and no other gets it.[22] It is not necessary for the finder to advertise for the purpose of discovering the owner.

18. Whatever claim the finder may have against the owner for recompense for his care and expense in the

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16 1 Humph. (Tenn.) 228-232 (1839).
17 7 Eng. L. & Eq., 424 (1851).
18 62 Ind. 281 (1878).
19 90 Pa. 377 (1879); 6 Phila. 18 (1865).
20 Am. & Eng. Encyc. Law, (2d Ed.) Vol. 19, p. 581, citing (1896) 2 Q. B. (Eng.) 44.
21 2 Bulst. (Eng.) 312 (1657).
22 45 Mich. 320 (1881).

keeping and preservation of the property, he has no right to retain it until he be reimbursed.[23] He must surrender it, and may then sue the owner for the expense incurred.[24]

There is an exception to this rule in the case of *salvage*, which is an allowance made by the consent of all nations and all laws for saving a ship or goods from dangers of the sea, fire, pirates, or enemies. When property is thus in imminent danger of being lost, it is generally saved only at the hazard of the lives of those who save it. Principles of public policy dictate to civilized and commercial countries, not only the propriety, but even the absolute necessity, of establishing a liberal recompense for the encouragement of those who engage in so dangerous a service.[25]

19. Where a reward is offered for lost property, the finder, in compliance with the terms of the offer, has a right to retain the property in his hands until the reward be paid him.[26] The right of the finder to recover a reward, of the existence of which he was ignorant, offered for the return of lost property, varies in different localities. In England,[27] and in some of the United States, the rule is that knowledge of the reward is immaterial, but in most of the United States, it is considered essential.[28] The finder of lost property is not entitled to a reward for finding it, if there be no promise of such reward by the owner; and a person who finds an article which has been merely mislaid, and not lost, is not entitled to a reward which has been offered for its return. The reward belongs to the one on whose premises it was found.[29]

20. When a person finds goods that have actually been lost, and takes possession with intent to appropriate them to his own use, really believing at the time, or having ground to believe, that the owner can be found, he is

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23 45 Mich. 317 (1881).
24 40 Dana (Ky.) 193 (1836).
25 2 Pet. Adm. (U. S.) 425 (1790); 2 H. Bla. (Eng.) 257 (1793).
26 1 Ore. 88 (1854).
27 4 B. & Ad. (Eng.) 621 (1833).
28 38 N. Y. 248 (1868).
29 98 Mass. 141 (1867).

guilty of the crime of larceny.[30] But if, at the time of the finding, he does not know who the owner is, or believes that he cannot be found, it is not larceny, even if he appropriate the goods with the intention of exercising dominion over them.[31]

Where, at the time of the finding, the party has no intention of appropriating the thing found to his own use, but, on the contrary, intends to return it to the owner, if he can find him, but afterwards disposes of it to his own use, either before or after he knows who the owner is, this is not larceny, because there was no intention of stealing at the time of the taking.[32] And if, when the goods are found, the finder believe that the owner cannot be ascertained and he subsequently dispose of them to his own use, either before or after he knows who the owner is, it is not larceny.[33] The finder of property which is merely mislaid, however, is guilty of larceny if he intend to appropriate it to his own use; and it is immaterial whether the intention of stealing were formed at the time of the taking or subsequently.[34]

21. Confusion of Goods. — Such a mixture of the goods of two or more persons that they cannot be distinguished is called in law **confusion of goods.**[35] It arises whenever the like chattels of two or more persons are so blended or mixed together as to have become indistinguishable.[36]

The rule of law as to confusion of goods is only applied where the articles mixed together differ in value or quality, and the original value or quality of each component cannot be clearly determined. In the case of goods of equal value mingled together, such as flour or corn, each party would receive his proportional part and no more. And again, when the chattels mingled are of a sort to be readily distinguished and separated, cattle or the like, the law of confusion does not apply.

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30 35 Ohio 49 (1878).
31 3 Cox Cr. Cas. (Eng.) 453 (1849).
32 2 Car. & Kir. (Eng.) 830 (1848).
33 8 Tex. Ct. of App. 42 (1882), citing Archbold Cr. Pl., Secs. 388-395.
34 58 Ala. 425 (1877).
35 Bouv. Law Dict.
36 Schoul. Per. Pr., Vol. 2, Sec. 42.

22. The **rights of the parties** in a case of confusion are settled accordingly as the case falls within one or another of five classes. These are where the property is mingled by (1) *mutual consent*, (2) *wilful misconduct*, (3) *unintentional error*, (4) the *act of a stranger*, or (5) *inevitable accident* or *superior force*.

23. Where property has been mingled by **mutual consent** of the owners, their rights to it may be considered as founded upon contract. If they have made no contract, it is presumed that the parties agreed to take the mass as owners in common, in proportion to their respective shares.[37] Of this class is the mixture or confusion of grain by consent in grain elevators.

The grain of many different persons is frequently mixed in elevators, in process of transportation from place to place. The rights of the parties in the event of loss, or in claiming their property, depend upon the terms upon which the warehouseman, or owner of the elevator, received the goods. Where, under the contract, the bailors of the grain are owners in common, they bear any loss that may occur in common. But, where the goods are delivered to the warehouseman under such terms as really constitute him an owner instead of a mere bailee, the losses fall upon him.[38]

24. A loss caused by a **wilful** and **wrongful intermixture** of property must be borne by the person guilty of such misconduct. But, where a wrongful mixture takes place resulting in a separate product more valuable, it will be separated proportionally, if practicable, and such a separation will be made in any case where the goods are readily separable.[39]

25. A confusion resulting from **unintentional error** will throw no loss upon the person bringing about the mixture where it is at all possible to make a separation.[40]

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[37] 28 Me. 429 (1848).
[38] Schoul. Per. Pr., Vol. 2, Sec. 46.
[39] 81 Iowa 658 (1891).
[40] 18 Md. 513 (1861).

26. In the event of an intermixture **caused by the act of a stranger,** if the mass be inseparable into its components, the several owners become tenants in common of the mixture. The same rule applies to cases in which a mixture is brought about by an **inevitable accident.**[41]

INVOLUNTARY TRANSFER

27. **Involuntary transfer** of personal property, or transfer by act of law, may take place (1) in the event of bankruptcy; (2) in the case of a judgment for debt. Both of these subjects are treated under another title.[42]

VOLUNTARY TRANSFER

28. **Voluntary transfer,** or transfer by act of the parties, includes *alienation* by way of *gift*, *sale*, *exchange*, *mortgage*, and *assignment*.

GIFTS OF PERSONAL PROPERTY

29. A **gift** is a voluntary, gratuitous transfer of property by one person to another;[43] it may include any and every kind of property, real and personal, corporeal and incorporeal, the only requisites being that the thing given must be definite and certain and in existence at the time of the gift.[44] That a gift may take effect, it must be made by the donor, or giver, voluntarily and freely. Circumstances that indicate the gift to have been made in consequence of undue influence, as where the donor was sick or feeble, or induced by shame to make the gift, will prevent it from taking effect.[45]

30. In the case of a gift between persons in a confidential relation, a rule of public policy and pure morals, founded in long experience of the human heart and knowledge of man's cupidity, interposes to prevent its consummation. From the relation of the parties the gift is

[41] L. R. 3 C. P. (Eng.) 427 (1868).
[42] See *The Law of Debtor and Creditor.*
[43] 2 Black. Comm. 440.
[44] 4 J. J. Marshall (Ky.) 139 (1830).
[45] 8 Atl. Rep. 436-438 (1887).

presumed to have been fraudulently made and is *prima facie* void. In the United States, this peculiarity throws upon the beneficiary the duty of showing expressly that the arrangement was fair and conscientious, beyond the reach of suspicion.[46] In England, a stricter rule prevails; in order to uphold a gift made to a person standing in a confidential relation, the donor must have had competent and independent advice in conferring it.[47] Both in England and the United States, gifts from a client to an attorney, from a patient to a physician, from persons to their spiritual advisers, from wards to guardians, from one relative to another who has the ascendency, are presumably void.[48]

GIFTS INTER VIVOS

31. Gifts are of two kinds, *gifts inter vivos* (between living persons) and *gifts mortis causa* (in prospect of death). A **gift inter vivos** is an *immediate*, voluntary, and gratuitous transfer of personal property by one person to another, without any prospect of immediate death.[49]

There is a distinction between a *gift inter vivos* and a *voluntary trust*. In a trust, the real title vests in the donee, but the legal title, perhaps carrying control of the property, may be placed elsewhere; while in a gift, both the real and legal title instantly fall to the donee.[50] Where made perfect by delivery of the thing given, gifts *inter vivos* are executed contracts. By delivery and acceptance the title passes, the gift becomes perfect, and is irrevocable.[51]

Where a gift of personal property is made, intended to take effect immediately and irrevocably, and fully executed by complete and unconditional delivery, it is binding upon the donor as a gift *inter vivos*, even if the donor at the time be at the point of death and die soon after.[52] A gift made in anticipation of death, but not conditioned upon that event, is a gift *inter vivos*.[53]

46 14 Pa. 489-505 (1850).
47 8 Q. B. Div. (Eng.) 591 (1881); 6 Ch. (Eng.) 638 (1877).
48 2 Y. & C. Ch. (Eng.) 104 (1843); 14 Ves. Jr. (Eng.) 273-300 (1807).
49 2 Ves. 547 (1754).
50 88 Me. 122-125 (1895).
51 24 Pick. (Mass.) 261-264 (1837).
52 69 Wis. 576-580 (1887).
53 46 Me. 48-68 (1858).

32. The elements necessary to the validity of a gift *inter vivos* are: (1) The donor must be competent to contract; (2) there must be freedom of will; (3) the gift must be complete; (4) the property must be delivered by the donor and accepted by the donee; and (5) the gift must go into immediate and absolute effect.[54]

Gifts *inter vivos* have no reference to the future, but go into immediate and absolute effect.[55] A gift to take effect in the future is void. The same is true of a gift of property dependent upon donor's death, he, meanwhile, having control of it;[56] and a mere promise to give without consideration does not constitute a valid gift, nor does a mere expression of intention to give.[57] The court will not perfect an imperfect gift nor enforce it as a declaration of trust.[58]

In order to transfer property by gift there must be either a deed or instrument of gift, or an actual delivery of the thing to the donee, coupled with an intention to give.[59] There must be an immediate transfer of at least the equitable title, and the donor must relinquish all present right to, or control over, the thing given.[60] In the case of a gift by deed, if it be founded upon a good consideration, delivery of the property to the donee is unnecessary.[61] The deed itself, however, should be delivered, and in order to be effectual against purchasers and creditors, it should be recorded.[62]

33. Where the property given is already in the possession of the donee, actual physical transfer at the time of the gift may be dispensed with.[63] To complete the gift it is sufficient that the conduct of the parties show that the ownership of the property has been changed;[64] but where the property is delivered to a third person in the capacity of a trustee for the donee, and not as agent of the donor, such delivery completes the gift.[65]

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54 89 Hun (N. Y.) 465–469 (1895).
55 38 Ind. 451, 453 (1872).
56 136 Ill. 398 (1891).
57 36 Ill. App. 81 (1890).
58 4 De G. F. & J. (Eng.) 274 (1862).
59 2 B. & Ald. (Eng.) 552 (1819); 141 Mo. 656 (1897).
60 105 Cal. 148 (1894).
61 5 Bush. (Ky.) 248 (1868).
62 3 Litt. (Ky.) 278 (1823).
63 57 Me. 386 (1869).
64 4 L. T. N. S. (Eng.) 649 (1861)
65 93 Tenn. 266 (1893).

The delivery must be actual so far as the property is capable of delivery. If the property be not capable of actual delivery, there must be some act equivalent to it.[66] The donee is only required to take such possession as the character of the property admits of.[67]

If the property be so bulky as to be incapable of manual delivery, then pointing it out and directing the donee to take possession of it will amount to a valid gift. So, if the subject of the gift be under lock and key, delivery of the key, accompanied with the words expressing a present intention to give, will satisfy the requirements of law;[68] so, also, as to a gift of various articles, all that is necessary is that the donor distinctly point them out and direct the donee to take possession of them.[69]

34. Where a person intending to make a present of an article declares that he holds it in trust for another, he is considered a trustee of the article, and actual delivery is dispensed with. But the law will not imply such a trust; it must be expressed.[70]

35. If the thing given be incorporeal personal property, not evidenced by a note or other written instrument, the law requires an assignment or some equivalent instrument, and the transfer must be actually executed;[71] but if the incorporeal property be evidenced by a written instrument, a delivery of the instrument to the donee, without a written assignment, but with a clearly manifested intention of making a gift, is sufficient to satisfy the rule requiring delivery of the thing given. The rule is that delivery must be such a transfer as the nature of the subject will allow. The delivery of the formal writing, which evidences the debt and forms the foundation of the right of action, is the best and only delivery of which the subject is capable.[72]

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66 28 N. H. 56 (1853).
67 55 Vt. 407 (1883).
68 91 Ala. 245 (1890).
69 23 N. Y. 504 (1861).
70 91 Ala. 245 (1890).
71 78 Pa. 218 (1875).
72 54 N. J. Eq. 212 (1896).

36. In the United States, the delivery of a life-insurance policy constitutes a valid gift without any written assignment.[73] In England, in order to perfect the gift, there must be a written assignment.[74] There is no settled doctrine as to what formalities are necessary to create a gift of stock. Some jurisdictions hold that mere delivery, without a written assignment, is sufficient.[75] Others require a written assignment.[76]

37. A gift is not valid and obligatory until accepted by the donee. It may be that the donee does not desire to have the property. There may be burdens growing out of the ownership which he does not care to assume. If he affirmatively decline to accept the donation, the law does not force it upon him against his will. If the gift be for his advantage, he will be presumed to have accepted it, unless the contrary appear.[77] The acceptance of a gift need not be immediately after the delivery; it is sufficient that it be accepted before revoked by death or otherwise.[78]

GIFTS MORTIS CAUSA

38. **Donatio mortis causa** (a gift in prospect of death) is a gift of personal property made by a person in his last illness, or in the peril of death, subject to the implied conditions, that if the donor recover, or if the donee die first, the gift shall be void.[79] To constitute a valid gift *mortis causa*, the gift must be made with a view to the donor's death; it must be subject to the condition that it will be effective *only* on the donor's death; and there must be a delivery of the subject of the gift. No particular form of words is necessary to give effect to the transaction as a gift, if the evidence of that which was said and done be sufficient to establish its validity.[80]

39. *Personal property only* may be the subject of the gift, and generally, the gift is none the less valid because

[73] 54 N. J. Eq. 212 (1896).
[74] 1 Ex. D. (Eng.) 169 (1876).
[75] 50 Conn. 472 (1883).
[76] 65 Md. 93 (1885).
[77] 29 Cal. 122 (1870).
[78] 63 Mich. 192 (1886).
[79] 23 Pa. 59 (1854).
[80] 54 N. H. 37 (1873).

it embraces the *entire* personal estate of the donor. The law places no limitation upon the amount of property that can be given.[81]

Gifts *mortis causa* cannot be created by formal instruments of conveyance or assignments.[82] In a few states, it is held that such gifts can be effected by a deed.[83] They cannot be given by an instrument which is testamentary in character and which has not been executed in the manner and with the limitations provided for wills.[84]

40. Distinguished From Gifts Inter Vivos.—There is but one thing in the making of a gift *mortis causa* which distinguishes it from a gift *inter vivos;* that is, it must be made in anticipation of death from an impending peril. In every other respect the same things are essential in making both gifts.[85] But after a gift *mortis causa* has been as complete and perfect in all respects as is required in the case of a gift *inter vivos*, the law attaches to the former gift three conditions which do not apply to the latter: It can be reclaimed by the donor before his death, his recovery from the impending peril revokes it, and it is revoked if the donor survive the donee. In the one case, the title passes immediately to the donee on delivery and the donor relinquishes all control over the property; in the other, the title does not pass immediately. It is a conditional gift to take effect only on the death of the donor, who, in the meantime, has the power of revocation and may at any time resume possession.[86]

41. Distinguished From a Legacy.—A *gift mortis causa* is somewhat in the nature of a *legacy* but differs from it in several respects. In a gift *mortis causa*, delivery by the donor during his lifetime is essential, while in the case of a legacy the testator retains control of the property until his death.[87] The claim of the donee need not be proved in court of probate.[88] The title to the gift passes by delivery,

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81 24 Vt. 591 (1852).
82 116 Mass. 568 (1875).
83 54 N. H. 24 (1873).
84 107 U. S. 602 (1882).
85 33 N. Y. 581 (1865).
86 75 Cal. 548 (1888).
87 13 Allen (Mass.) 43 (1866).
88 2 Stra. (Eng.) 777 (1795).

defeasible only in the lifetime of the donor by revocation. At his decease, the donor is already divested of his property in the subject of the gift, so that no right or title in it passes to his personal representatives. It is a claim *against* the executor or administrator of the decedent; a legacy is a claim *from* him. If needed to pay debts, a gift *mortis causa* may be recovered by the representative; but, if there be a residuum of the gift after the payment of debts, it goes to the donee, and not to the decedent's estate.[89]

42. Expectation of Death.—To make such a gift valid, it is essential that it be made during the sickness of the donor, or while under the belief that he is in peril of death, or surrounded by threatened dangers from which he has an immediate existing apprehension of death, and, in contemplation of death from such sickness, peril, or dangers, is thereby moved to make the donation.[90] It is not necessary that the donor should be actually expiring, nor that he should die from the apprehended disease.[91] It is sufficient, if, before his recovery from the apprehended disease, he die from some other disease existing at the time.[92]

The gift cannot be made in contemplation of death by suicide. An essential element is that if the donor recover, the gift is at an end and the right to recover the property given reverts to him. In the case of intentional suicide, this is impossible.[93]

The gift must be completely executed and go into effect at once, subject to be divested by the happening of any of the conditions subsequent; that is, upon actual revocation by the donor, or by the donor's surviving the apprehended peril, or outliving the donee.[94]

An express qualification that the donee shall hold the property only in the event of death is not necessary to make a valid gift. It may be found to be such a gift from the

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[89] 94 N. C. 274 (1886).
[90] 4 Coldw. (Tenn.) 288 (1867); 2 Ves. Jr. (Eng.) 111 (1793).
[91] 49 N. Y. 20 (1872).
[92] 125 N. Y. 579, 580 (1891).
[93] 2 Irish Rep. Q. B. & Ex. D. 216 (1894).
[94] 107 U. S. 609–610 (1882).

attending circumstances, though the written transfer and the delivery may be absolute.[95]

43. Delivery.—Delivery before death is just as essential to a gift *mortis causa* as it is to a gift *inter vivos*, and the same rules as to delivery are applicable to both.[96] Like a gift *inter vivos*, the delivery in case of a gift *mortis causa* must be actual as far as the property is capable of actual delivery. If it be incapable of manual delivery, there must be some act equivalent to it.[97]

When the gift is incorporeal personal property, the delivery may be by merely handing over the written evidence of the property without indorsing or assigning it.[98] A written instrument, however, must be the evidence of a subsisting obligation and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it. A delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation, according to its terms, will not suffice. If the delivery give the donee power to control the fund only after the death of the donor, when, by the instrument itself, it is presently payable, the gift is testamentary in character, and not good as a gift in prospect of death.[99]

44. The delivery need not be made to the donee personally, but may be made to another as his agent or trustee. A delivery thus made is as effectual as though it had been made directly to the donee. If the delivery be made to a third person with instructions to deliver to the intended donee at the death of the donor, the latter retaining dominion over it meanwhile, the delivery is ineffectual, because the third person is merely the agent or bailee of the donor; but when delivery is made to a third person for the use of the donee, or under such circumstances as indicate that the donor relinquishes all right to the possession

95 49 N. Y. 21, 22, (1872).
96 59 Ark. 194 (1894).
97 56 Me. 330 (1868).
98 7 Gray (Mass.) 382 (1856).
99 107 U. S. 614 (1882).

or control of the thing given, and intends to vest a present title in the donee, the gift will be sustained.[100]

Where a person in view of impending dissolution clearly and intelligently manifests an intention to make a present gift to another, and in consummation of this intention makes such delivery to the third person for the use of the intended donee as he is then capable of making, considering the character and situation of the property, the person to whom delivery is thus made will be presumed, in the absence of countervailing circumstances, to take the property as the trustee of the intended donee and not merely as the agent of the donor.[101]

45. In the United States, although the donee is already in possession of the property which is the subject of a gift *mortis causa*, delivery is absolutely necessary. A gift *mortis causa* differs in this respect from a gift *inter vivos*, which may be valid without a distinct act of delivery at the time of the donation, if the property be then in the possession of the donee and the gift be supported by long acquiescence on the part of the donor.[102]

In England, an antecedent delivery of the property to the person intended to be benefited, although with a different intent, is sufficient to effect a valid gift *mortis causa*.[103]

Not only must the delivery be actual and complete, but the donee must constantly retain possession of the property. Although the delivery may have been at one time complete, if the donor regained possession, the gift becomes nugatory.[104] And, as in the case of a gift *inter vivos*, acceptance of the subject of the donation is essential to complete a gift *mortis causa*. Where the gift is beneficial to the donee, acceptance is presumed until the contrary is proven.[105]

46. Revocation.—As a gift *mortis causa* passes to the donee only a defeasible right, that is one that may be

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100 14 Ala. 158 (1848); 43 Ark. 307 (1884).
101 *Ibid.*
102 81 Me. 243 (1889).
103 L. R. 2 Q. B. Div. (Eng.) 283 (1896)
104 56 Me. 324 (1868).
105 59 Ark. 195 (1894).

rendered void, the donor has the *power of revocation* and may at any time annul the gift.[106] There may be revocation by the recovery of the donor or by his survival of the peril impending when he made the gift, or by the death of donee before that of the donor. But a donor cannot revoke his gift by subsequently bequeathing by will the property already given. A will does not take effect until the testator's death; the moment the donation, by its terms, becomes absolute, it is too late to revoke it.[107]

The birth of a child to the donor after he has made a gift *mortis causa* will revoke the gift under those circumstances where such birth would have revoked a will.[108]

SALES OF PERSONAL PROPERTY

47. The most important form of voluntary alienation of personal property is that by sale. A sale is, in reality, one kind of contract to which all the general rules of contract law apply; it is a contract for the transfer of property from one person to another for a valuable consideration.[1]

48. Definition.—A **sale** is a transfer of the absolute or general property in a thing for a price in money. In a contract of sale, the elements necessary to the validity of any other contract must be present; that is, there must be parties competent to contract, mutual assent, etc.[2]

Besides these requisites, it is essential that there be a transfer of the absolute or general property in the thing sold, and that the price paid or promised be in money. If goods be given for goods, the transaction is barter; if goods for labor, it is a mere transfer of property, but not a sale. So that in a sale, the price or consideration contemplated is money.

49. A sale differs from (1) a **bailment,** which is not a transfer of the general ownership in goods;[3] (2) a **consignment,** in which no title passes to the consignee whose

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106 17 Me. 287 (1840).
107 2 Bradf. (N. Y.) 432 (1853).
108 *Ibid.* 339.
1 2 Kent's Comm. 468.
2 Benj. Sales, Sec. 1; see *The Law of Contracts.*
3 See *The Law of Bailments;* 117 Pa. 589 (1888).

interest in the property cannot be attached by his creditors;[4] (3) an **exchange,** or barter, which is not a transfer for money;[5] (4) a **lease,** which is a temporary transfer, and not of the general or absolute title or ownership;[6] although, in many jurisdictions, it is held that an agreement in the form of a lease in which the lessee binds himself to pay a stated sum per month for a number of months or weeks, at the end of which the title to the property is to vest in the lessee, is a sale, though purporting to be a lease;[7] (5) a **mortgage,** "in which, although the general title passes at once, yet it is defeasible on performance of the condition, by which act the title reverts immediately to the mortgagor, without any act of reconveyance by the mortgagee"; (6) a **pledge,** which is a transfer of a special title only.[8]

PARTIES TO A SALE

50. The Vendor. — It is a general rule that only the owner of goods or his lawful agent can transfer a good title to them; but to this rule there are a few important exceptions.

51. Market Overt. — In England, certain places called **markets overt,** or **open markets,** are set aside by custom, where goods are publicly sold on certain days. In London, every day except Sunday is a market day, and every shop in which goods are offered publicly for sale is market overt for such goods as the owner openly professes to trade in. Goods bought in market overt become the property of the purchaser, irrespective of the manner in which the vendor or seller obtained them, provided the buyer have acted in good faith, and that the goods sold do not belong to the sovereign.[9] In the United States, the doctrine of market overt has never been recognized, and a person who buys

[4] 9 Pick. (Mass.) 441 (1830).
[5] 33 Neb. 167 (1891).
[6] 20 Vt. 315 (1848).
[7] 93 U. S. 664 (1876); 134 Pa. 566 (1890); 4 Lea (Tenn.) 439 (1880).
[8] Benj. Sales (7th Ed.), p. 9; 20 Pick. (Mass.) 405 (1838).
[9] Benj. Sales (7th Ed.), p. 12; 5 Coke 83 b. (Eng.) (1826).

property from one who has come by it wrongfully takes no better title than his vendor had, though the sale were a public one.[10]

52. A person to whom goods have been pawned has the right to sell them for failure to redeem at the appointed time.[11] A sheriff may sell property of a defendant on execution and the purchaser will take a good title.[12] The master of a ship has by law the authority to sell the goods of the person shipping the cargo in order to realize funds for necessary repairs.[13] Factors, brokers, and other persons to whom goods are customarily entrusted to be sold, are considered the true owners of the property, so far as disposal of it is concerned.[14]

53. The Vendee.—Any person having capacity to contract may become the purchaser of property. Those who, by the law of contracts, are relieved from liability upon their obligations, are exempt as well from liability for their purchases. Infants, lunatics, married women, and, in some circumstances, drunkards, cannot, as a general rule, be held liable upon contracts of purchase.[15]

54. Mutual Assent.—Assent may be either express or implied, but it must be *mutual*. The parties must have in mind the same thing at the same time, and they must intend to bind themselves by a bargain mutually agreed upon. He to whom an offer is made must further make known his assent to the other. Where one party offered to buy a horse if warranted "sound and quiet in harness," and the vendor delivered the horse to him with the warranty that it was "sound and quiet in double harness," it was held that the assent was not mutual.[16]

55. The Thing Sold.—Unless the property intended to be transferred by the sale be in existence at the time of the

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[10] 8 Mass. 518 (1812).
[11] 2 Sandf. (N. Y.) 143 (1844).
[12] 5 B. & A. (Eng.) 826 (1822).
[13] 13 M. & W. (Eng.) 239 (1844).
[14] Stat. 6, Geo. IV, c. 94, Sec. 2 (1825).
[15] See *The Law of Contracts.*
[16] 4 M. & W. (Eng.) 155 (1838); see *The Law of Contracts.*

contract, there is no sale. Nor can there be a sale if the subject of the contract, for any reason, have ceased to be the property of the vendor. A sold to B a cargo of corn loaded on a vessel that had not yet arrived. It transpired later that the master of the vessel, finding the grain in danger of spoiling, had sold it a month before the contract between A and B. B was held discharged from any liability upon his agreement.[17]

No actual sale can be made of property not yet in existence. But things that are certain to come into existence, as, for example, the milk that a cow will yield during a future month, may be made the subject of an agreement to sell. This is not an actual sale, for there can be no immediate transfer of the thing to be sold.[18] A deed of sale in which the vendor sold to the vendee all the goods, etc., then "remaining and being or which should at any time thereafter remain and be in his dwelling house," was held ineffective to pass the property in goods not in existence, or not belonging at the time to the vendor.[19]

In the case of things no longer in existence, there can be no sale, because it is impossible to perform the contract.[20] The rule as to things to be acquired by the vendor varies. Sales of such things are sometimes called executory contracts of sale which become executed upon acquisition of the thing by the vendor;[21] they are mere agreements to sell.[22] It is agreed that the property will be transferred by such an instrument as between parties, if it be sufficiently described.[23] There is a difference in this respect, in the United States, between the rule at law and the rule in equity, a sale of after-acquired property being held impossible at law, and equity holding such a sale effectual.[24] A good title to the unborn young of animals may be transferred by sale, at all events during gestation.[25]

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17 5 H. L. C. (Eng.) 673 (1856).
18 5 Taunt. (Eng.) 213, 222 (1814).
19 1 C. B. (Eng.) 379 (1845).
20 20 Pick. (Mass.) 139 (1838).
21 15 Ont. Rep. 618 (1888); 108 Mass. 347 (1871).
22 40 Me. 561 (1855).
23 43 Wis. 583 (1878); 2 Low. (U. S.) 458 (1875).
24 64 Pa. 366 (1870).
25 93 Ky. 205 (1892).

56. The Price.—It is requisite that the consideration, or **price** in a sale, be in money; it may be paid at once, or at some future time agreed upon. The agreement or contract of sale may fix the exact price to be paid for the goods sold, but it may be determined in some other manner. Where no price is fixed, the reasonable value of the goods is presumed to have been understood.[26] It is also competent for the parties to agree that certain persons designated shall name the price, the sale being incomplete until the valuers have decided upon it. The price, if fixed by the agreement, need not, in terms, be a given sum. It may be "for the same price as similar articles may bring afterwards at auction," or it may be determined in some other way.[27]

57. The Statute of Frauds.—Contracts of sale to be valid must conform with the provisions of the **statute of frauds.** By that statute, in all contracts for the sale of goods, wares, or merchandise for a price above a sum named in the original enactment, or in the various enactments based upon it in the United States, the buyer must accept and actually receive part of the goods sold, or he must give some earnest either to bind the bargain or as part payment, or some note or memorandum in writing of the bargain must be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.[28]

58. Contracts Comprehended by the Statute. Actual sales or executed contracts of sale and executory contracts, wherein the transfer of property is to take place at some later time, are both within the statute, as well in England as in the United States.[29]

A distinction is taken between a sale and a contract to manufacture an article. It is generally conceded that a sale is within the statute and that a contract for the

[26] 10 Bing. (Eng.) 376 (1834).
[27] 44 Wis. 72 (1878).
[28] Stat. 29, Chas. III, Sec. 17 (1677).
[29] 39 Atl. Rep. 442 (1894): 2 H. Bl. (Eng.) 63 (1792).

manufacture of an article is not within the statute.[30] It is often a matter of difficulty to decide whether a given contract is the one or the other. For example, a person went to the establishment of a carriage maker and selected a lining with which the latter agreed to complete one of several unfinished buggies within a fortnight. Upon a suit for the purchase-money, it was decided that this was a contract to build a buggy, not to sell one, and, consequently, not within the statute of frauds.[31]

The example given illustrates what is known as the Massachusetts doctrine. But where the commodity to be made is such as the vendor ordinarily keeps on hand, the contract under this doctrine is one of sale. Thus, where in response to an order for one hundred boxes of candles at twenty-one cents per pound, the manufacturer said that the candles were not then manufactured, but that he would make and deliver them in the course of the summer, it was decided to be a contract of sale and not of manufacture.[32] Under the New York decisions,[33] if the contract provide for the construction of the subject from raw material, in other words, for a complete process of manufacture (like the case of the candle manufacturer, just illustrated), it is a contract of manufacture and not of sale.[34] On the other hand, where, as in the first case given (of the carriage maker), the article contracted for is substantially in existence, but needs some further touches to complete it, the contract is one of sale.[35]

The effect of the various clauses in the statute of frauds, with reference to contracts of sale is fully considered elsewhere.[36]

TRANSFER OF TITLE

59. Contracts Executed or Executory. — Contracts are said to be *executed* or *executory*. The word *sale* implies an **executed contract,** since it contemplates a present

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30 73 N. Y. 252 (1878).
31 21 Pick. (Mass.) 205 (1838).
32 9 Metc. (Mass.) 177 (1845).
33 18 Johns (N. Y.) 58 (1820).
34 8 Cow. (N. Y.) 215 (1828).
35 19 Barb. (N. Y.) 455 (1854).
36 See *The Law of Contracts:* Statute of Frauds.

transfer of personal property for a price in money.[37] An executed contract of sale is one in which the title to the goods sold vests immediately in the buyer; the goods themselves may or may not pass at once into his possession.[38]

An **executory contract** of sale is, in reality, not a sale. It is an agreement to sell at some future time, until which time the vendor retains the ownership of the goods.[39] If the contract, whatever its form, be a present transfer of goods specified, it is an executed contract. If no goods be specified until they are made specific, the contract is executory. The determining factor, other things being equal, is the intention of the parties, as gathered from their language, actions, and the surrounding circumstances. Where the intention cannot be ascertained, the contract is presumed to be executed, that is, an actual sale, provided the goods have been specified. If they be not specified, or, if the vendor must do some act with reference to them before delivery, the contract is presumed to be executory.[40]

60. Transfer of Title to Specific Chattels. — 1. *Unconditionally.* — Where the elements of an executed contract of sale are present in a given bargain, the title passes immediately whether the possession of the property does or not.[41] The real difficulty is to ascertain whether or not the contract under discussion possesses these requisites. If the vendor "by the contract itself appropriates to the vendee a specific chattel and the latter thereby agrees to take that specific chattel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."[42]

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[37] 22 Wall. (U. S) 180, 187 (1874).
[38] 39 Conn. 413 (1872).
[39] 91 Ga. 178 (1892).
[40] 49 N. Y. 35 (1872).
[41] Shep. Touch., p. 224.
[42] 5 B. & Ad. (Eng.) 313, 340 (1833), by Parke, J.

2. *Conditionally.*—A contract may be in the form of an immediate sale of specific chattels, to which, nevertheless, by mutual understanding some act remains to be done. In such a case, until all the conditions are fulfilled, no property in the thing will pass. It is to be understood that in all cases where the intention of the parties is apparent or obvious, effect will be given to it, provided it be a lawful one. For the determination of cases of this kind two rules have been laid down: (1) Where, by the agreement, the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property. (2) Where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they be in the state in which they ought to be accepted.[43]

Both of these rules have reference to putting the goods into a deliverable condition. The act to be done may be done by the seller, by the purchaser, or by both concurrently. It is of great importance, upon loss of the property by fire or any other casualty, to know to whom the property belongs at the moment of its destruction, since upon him the loss must fall. The two rules stated above have been applied, since their enunciation, by the courts of England as well as by those of the United States, but with varying results. The way in which they are applied may be illustrated by a few of the decisions.

ILLUSTRATIONS.—In a contract of sale, two hundred and eighty-nine bales of goats' skins, containing five dozen in each bale, were to be transferred to the purchaser at the rate of 57s. 6d. per dozen. By

[43] Blackb. S., pp. 151, 152, quoted in Benj. Sales (7th Ed.), p. 270.

the usage of the trade, it was the seller's duty to count the bales to ascertain whether each bale contained the required number of skins. The goods were destroyed by fire before the counting was effected. It was held that the property had not yet passed and that the seller must bear the loss.[44]

All of the bark stacked at a certain place was sold, at so much per ton. The weighing was to be mutual, on behalf of both parties, the price, of course, depending on the weight. A part of the bark had been weighed, delivered, and paid for, when the remainder was damaged. It was decided that the ownership of the unweighed residue was in the seller, and that he must bear the loss.[45]

In the United States, it has been held, that where the price has been fixed and the goods are ready for delivery with the exception of weighing and measuring, the property passes to the buyer.[46] Where, for the buyer's convenience, a second measurement or weighing is to be taken, the mere act of weighing will not postpone the vesting of the property in the buyer. Acts to be done by the buyer with reference to the goods do not, as a general rule, prevent the ownership from transferring.[47]

To summarize, in the case of specific chattels: (1) Where the obvious intention of the parties is that title to the property shall pass, irrespective of what acts remain to be done to it, effect will generally be given to the mutual intention; (2) where some act remains to be done by the seller, with respect to the goods, prior to delivery, the ownership does not change; (3) where the act is to be done by the buyer and the goods have not been delivered, or by some third person for the buyer's benefit, the ownership of the property is considered to have changed; (4) where the goods have been delivered to and accepted by the buyer, the property is regarded as vested in the buyer.[48]

61. Transfer of Title to Chattels Not Specific. While the kind of goods intended to pass by a given contract may be indicated, the chattel may fail of being specific,

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[44] 2 Camp. (Eng.) 240 (1809).
[45] 5 B. & C. (Eng.) 857 (1826).
[46] 51 N. Y. 431 (1873); 38 Vt. 683 (1866).
[47] 71 Me. 78 (1880).
[48] Schoul. Per. Pr., Vol. 2, Sec. 256.

because the quantity to be sold has not been separated from a larger amount, or because it has not been sufficiently appropriated to the contract to permit of the fixing of customary allowances, etc. As the goods lack identification, and as it is necessary to separate them before they can admit of delivery, the contract is, of necessity, executory; it is not susceptible of immediate performance. Instances of such contracts are a sale of two thousand telegraph poles out of a lot of twenty-one hundred lying together at the time, or a sale of a number of bushels of fruit not yet gathered from the trees. The general rule is that in such executory contracts the ownership does not pass to the purchaser until the separation is complete.[49] A like rule is applied to contracts for articles to be manufactured for the vendee. Such a contract cannot be other than executory, the goods not being in existence and immediate performance of the contract, by consequence, being impossible.[50] A distinction is sometimes made between cases in which there must be both selection and separation and those in which only separation is required, title being held to pass in the latter case. As has already been said concerning alienation of specific chattels, the first effort is to ascertain the actual intention of the parties; failing that, to come at their supposed intention by considering the circumstances, the contract itself, etc.[51] The decisions are not uniform and no rule can be stated that would comprehend all the cases.

62. Subsequent Appropriation. — An executory agreement to sell in the future may become an executed contract, that is, a bargain and a sale, by the performance of the acts on the doing of which fulfilment of the contract was made to depend. Such acts are those which make the goods specific, which identify them as the subjects of the particular contract. This is called a subsequent appropriation of specific chattels to the contract. When this is done, the contract is an executed one, and it falls within the

[49] 43 N. H. 141 (1861); 24 Kans. 90 (1880); 19 N. Y. 330 (1859); 51 N. Y. 288 (1873); 51 Pa. 66 (1865).

[50] Story, Sales, Secs. 232-315.

[51] 62 Barb. (N. Y.) 593 (1863).

rules which govern such contracts. "The selection of the goods by one party, and the adoption of that act by the other, converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes."[52]

The selection of the goods or appropriation of them to the contract may be performed by the buyer, by the seller, or by the one with the subsequent assent of the other. "Separation and setting apart, accompanied perhaps by a special selection, are the prime acts which constitute a legal appropriation so as to accomplish any presumed transfer of ownership."[53] Controversies on this head can only arise where the selection is to be made by the vendor. Where the purchaser is to make the selection, the appropriation takes place when he declares his choice. But, if the selection rest with the vendor, it is difficult to tell at what moment the appropriation is so complete that the title to the property vests in the purchaser, upon whom, of necessity, the burden of loss or destruction of the commodity must fall. Where one merchant gives to another an order for, say, twenty hogsheads of sugar, and it is the duty of the seller to appropriate the goods to the contract, "the difficulty is to determine what constitutes the appropriation; to find out at what precise point the seller is no longer at liberty to change his intention." The word *appropriation*, as here used, signifies the selecting, setting apart, or actually putting, the goods into such a situation that the buyer may come and take them.[54]

If, under the agreement, the selection and separation are to be made by the seller, who is then to notify the buyer, the buyer's acceptance binds the bargain or completes the appropriation.[55] Some authorities hold that the appropriation is complete even before the acceptance by the buyer. And if, by the contract, the duty devolve upon one or another of the parties to do some act to complete the

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[52] 6 B. & C. (Eng.) 388 (1827), Holroyd J.
[53] Schoul. Per. Pr., Vol. 2, Sec. 260.
[54] Benj. Sales, p. 329.
[55] 6 B. & C. (Eng.) 388 (1827); 6 M & G. (Eng.) 963 (1844).

appropriation, until that act has been done the transfer of the property is incomplete.[56] It is agreed that delivery by the vendor to a carrier in the manner directed by the purchaser is an appropriation of the goods to the contract, and, if loss occur, it must be borne by the purchaser.[57] As to articles manufactured to order, completion of the articles according to the contract, followed by delivery or by tender of delivery, is such an appropriation as will pass title.[58]

63. Reservation of the Jus Disponendi.—In the example given of delivery to a carrier by the vendor, it is competent for the vendor to prevent the title from vesting in the purchaser by acts manifesting his intention, such as making out a bill of lading in his own name. The vendor may not wish to relinquish control of the property until assured of payment by the vendee. If, instead of consigning the goods to the purchaser, he consign them to himself, or to his agents with a bill of lading in favor of himself or his agents, the title remains in him in spite of the delivery to the carrier. When the seller makes a delivery to the carrier in this manner, it is called a reservation of the *jus disponendi* (the right of disposing of a thing).[59] Where, in addition to these circumstances, the seller has drawn upon the buyer by bill of exchange or otherwise, the property in the goods is not divested until payment of the draft. Should a third person advance money on the faith of the bill of exchange, he will stand in place of the shipper, or vendor, subject to acceptance of the draft by the vendee.[60]

Opinion differs upon the effect of a shipment of goods, where the agreement contemplates payment by the buyer upon receipt or delivery of the goods. Goods sold under such conditions are usually marked C. O. D. (collect on delivery). Where the freight is paid by the purchaser, and the goods are lost in transit, it has been held that the vendor

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[56] 7 E. & B. (Eng.) 885 (1857).
[57] 67 Ill. 83 (1873); 109 Mass. 50 (1871).
[58] 15 Wend. (N. Y.) 493 (1836); 46 Pa. 177 (1863).
[59] 1 Wheat. (U. S.) 208 (1816); 13 R. I. 341 (1881).
[60] 91 U. S. 92 (1875).

can recover against the vendee for the purchase money. This is in effect saying there is no reservation of title—of the *jus disponendi*.[61] But the carrier may withhold possession of the property from the vendee until payment of the purchase money, and for this the vendee has no redress in the form of an action for possession.[62]

VALIDITY OF CONTRACT—HOW AFFECTED

64. A material error by the parties to the contract will invalidate it, or, at least, enable them to avoid it. Only unintentional errors are here intended, errors as to price, as to goods, etc., such as really mean that there has been no meeting of the minds, no mutual assent. Intentional errors caused by a misrepresentation or other deception amount to fraud.[63] Where, for example, a person purchases a vessel that has foundered at sea prior to the sale, he incurs no liability upon the contract.[64] This is equally true in any case in which the thing intended to be transferred by the sale is not in existence at the time. Mistakes as to the quantity of the goods to be passed by the contract amount, in reality, to a failure of consideration and make the contract voidable. It is necessary in all cases that the error be a substantial and material one, otherwise the contract will stand.

In the case of an executed contract of sale, where the property is already in the possession of the purchaser, the power or right of rescission of the contract depends on how far the position of the parties has been changed. If the mistake be mutual, the party who wishes to avoid the contract must put the other in the same position as he was in before the sale took place; as the expression is, he must put him in *statu quo*. Where the buyer wishes to avoid the sale, he must first restore the property to the vendor, unless it be absolutely worthless.[65]

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[61] 73 N. Y. 252 (1878).
[62] 130 Pa. 138 (1889).
[63] See *subtitle* Fraud in General, *infra*.
[64] 128 Mass. 22 (1879).
[65] 61 Pa. 427 (1869); 30 Vt. 139 (1858).

65. Fraud in General.—A contract may be avoided on the ground of **fraud,** or wilful misrepresentation. To avoid a contract for fraud, it is essential that the party seeking redress has been misled by bad faith on the part of the other and that he has been injured thereby.[66] The subject of fraud, as affecting the validity of contracts in general, is treated elsewhere in detail.[67] A sale may be avoided by reason of fraud practiced on the buyer, on the seller, or fraud practiced by both of these parties upon creditors.

66. Fraud on the Vendee.—The rule of *caveat emptor* (let the buyer beware) is applied in cases of this kind. It is the duty of the buyer before making a purchase to assure himself that the goods are what they are represented to be. He cannot wait for the seller to point out specific defects in the article, and claim afterwards that he has been deceived. He must inform himself of the condition of the property and, if dissatisfied, demand a warranty.[68] If both parties be ignorant of a defect in the article, and no deceit be practiced by the vendor, the rule of *caveat emptor* applies equally well.[69] And where the defect could have been discovered upon a careful examination by the purchaser, he has no redress if he discover it subsequently.[70]

But an active effort on the part of the vendor to deceive the vendee, whereby he induces him to make the purchase, or a concealment of something which the buyer was entitled to know, are such fraudulent acts as will enable him to avoid the contract.[71] For avoidance of a contract of sale on this ground, it must be shown that the vendor has acted with a guilty intention, and if he can prove the honesty of his purpose, the sale will not be avoided.[72] But reckless falsehoods, statements of beliefs as facts within the vendor's knowledge, cannot be excused on the basis of an honest

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66 Schoul. Per. Pr., Vol. 2, Sec. 602.

67 See *The Law of Contracts:* Reality of Consent, Fraud, etc.

68 L. R. 6 Q. B. (Eng.) 597 (1871); 103 Mass. 331 (1869).

69 49 Mo. 91 (1871).

70 107 Mass. 364 (1871).

71 Story, Sales, Secs. 378, 380; 29 Vt. 470 (1857).

72 4 Metc. (Mass.) 151 (1842).

intention.[73] Nor can an assertion by the seller that the property costs him twice as much as actually was the case be proved to have been made honestly.[74]

The buyer, upon discovery of the fraud, must act promptly and repudiate the bargain in its entirety; for he cannot elect to be bound by the contract in one particular and not bound by it in another. It is also essential for him to return the property to the vendor.[75] Failure to act immediately does not deprive him of all redress; it simply deprives him of the right to rescind, and he still has an action for damages.[76] The purchaser can take advantage of fraud on the part of the seller's agent only when he can put the seller in his original position, and his right of action against him depends upon his (the seller's) knowledge of, and participation in, the fraud of the agent.[77]

67. Fraud on the Vendor.—Questions as to fraud practiced upon the seller arise, for the greater part, where the buyer has misrepresented his financial standing. Where this occurs, and the buyer is actually insolvent or on the verge of insolvency, the seller can usually avoid the sale as fraudulent. It is immaterial in this connection whether the misrepresentation consisted of actual statements, or of suppression of essential facts. But it is generally conceded that mere knowledge by the vendee that he is insolvent, and that he will very likely be unable to pay, unaccompanied by a positive intention not to pay, or by acts or statements tending to hide his financial condition, will not, of itself, invalidate the contract of sale.[78] Where a person went to the establishment of a merchant and by representing to the latter that a competitor had offered him a specified class of goods at a price named, induced the merchant to sell him the goods at a price below the usual figure, the statement proving false, it was held that the merchant could avoid the sale as fraudulent.[79] If at the time of the sale the buyer had

[73] 11 Allen (Mass.) 522 (1866).
[74] 5 Hill (N. Y.) 63 (1843).
[75] 1 Ad. & E., (Eng.) 40 (1834); 14 Me. 364 (1837).
[76] 7 App. Div. (N. Y.) 122 (1896).
[77] 7 H. & N. (Eng.) 172 (1861).
[78] 73 Me. 395 (1882); 86 Md. 116 (1897).
[79] 166 Pa. 563 (1895).

no intention of paying for the goods, or if he had formed a decided intention not to pay for them, it will be considered a fraud on the seller, for it is certain that with knowledge of these facts he would not have parted with his property.[80] That such was the intention of the buyer in a given transaction may be inferred from his conduct and circumstances during its consummation.[81]

68. Subsequent Purchasers. — The rights of persons who have purchased from a fraudulent buyer vary according to the stage which the transaction has reached. If all title to the goods have passed from the seller, agreeably to his intention, a purchaser for value in good faith will be secure in his ownership, though the person from whom he obtained them came by them fraudulently.[82] But, if the seller merely intended to part with possession, retaining all his rights and remedies for the price or for the goods, he may in the event of fraud reclaim the goods wherever found.[83]

69. Fraud of Buyer and Seller on Creditors. — Sales made for the purpose of defeating the rights of creditors are the subject of statute, both in England and in the United States. The English statute, upon which all subsequent statutes touching the same matter have been founded, provides that conveyances of property, both real and personal, with intent to hinder, delay, or defraud creditors, shall be clearly and utterly void. This applies as well to subsequent creditors (under certain circumstances) as to existing creditors. Whether or not fraud exists in a given case is a matter of fact for the jury.[84]

A conveyance of personal property, in which the seller or conveyor retains possession of the goods, is, in many jurisdictions, a fraud in itself where the rights of creditors intervene; in others, it simply raises a presumption of fraud which may be overcome by proof. "The object of the legis-

[80] 114 Ala. 304 (1897); 128 Ill. 9 (1889).
[81] 88 Ind. 572 (1883).
[82] 22 Ohio 388 (1872).
[83] 141 Mass. 1 (1886).
[84] Stat. 13 Eliz. (Eng.), c. 5 (1601); 29 Eliz. (Eng.), c. 5, Sec. 2 (1601); Stat. 17 and 18, Vict. (Eng.), c. 36 (1854); 14 C. B. (Eng.), 410 (1854); Stat. 41, 42 Vict. (Eng.), c. 31 (1878).

lation on this subject was to put an end to frauds which were frequently committed upon creditors by secret bills of sale of personal chattels whereby persons were enabled to keep up the appearance of being in good circumstances, and possessed of property, and the grantees or holders of such bills of sale had the power of taking possession of the property to the exclusion of the rest of the creditors." The statutes insist upon registration and compliance with certain other requisities "with a view to affording creditors and parties interested a true idea of the position in life of the grantor, and to giving such information as would enable persons interested to ascertain the *bona fides* of the transaction."[85]

A fraudulent intention is always necessary to invalidate the transaction, and if creditors seek to set it aside, it must be shown that the guilty intention was shared by both buyer and seller.[86] Where a person has several creditors and funds insufficient to meet all their claims, he may, in good faith, pay one of them in full, though the remaining creditors receive nothing.[87]

70. Sales at Auction.—Good faith is essential to the validity of **sales at auction.** The use by the auctioneer of any fraudulent device in order to enhance the bids, thus increasing the price to the purchaser, entitles the latter to repudiate his bid.[88] Misleading advertisements, stating that the goods belong to the estate of some prominent personage, when such was not the case, were held to be a fraud on the buyer. But it is legitimate to refuse to auction goods unless the bids begin at a given minimum figure.[89]

71. Illegality.—Sales tainted with **illegality** are void. Some are made so by statute, others are illegal at common law. Sales of articles for the furtherance of some purpose contrary to good morals or in violence of public decency are

[85] 3 N. H. 415 (1826); Benj. Sales (7th Ed.), p. 463.
[86] 152 U. S. 527 (1894).
[87] 155 Mass. 112 (1891).
[88] 8 How. (U. S.) 134 (1850).
[89] 15 N. J. Eq. 173 (1852); 11 S. & R. (Pa.) 86 (1824).

illegal at common law. Accordingly, it is illegal, without any special statutory provision, to sell obscene books or pictures, or implements for the commission of murder or burglary. In the same category are sales of goods to the public enemy, and sales of public offices or the emoluments thereof.[90] In the class of contracts of sale made illegal by statute belong such acts as the taking of usurious interest,[91] the conducting of a lottery,[92] the sale of intoxicating liquors without a license where one is required.[93]

72. Mutual Rescission of the Sale. — It is within the power of the parties at any stage of the transaction to revoke the contract.[94] The revocation must be mutual and its effect is to release each party from the obligations hitherto incurred.[95] Where the rights of creditors are involved, as much formality is required to undo the sale as was necessary to effect it.

PERFORMANCE OF THE CONTRACT[n]

73. Conditions. — A contract is made up of two counter propositions, or stipulations; one party binds himself to do a certain thing, the other to do something in return. A difficulty is encountered upon an alleged breach of a contract of sale in determining whether the stipulation made by the one party is only to be performed in case the other party performs his, or whether it may be neglected without enabling the latter to avoid his contract. But, it is first necessary to decide whether the statement in controversy is a part of the contract; having decided that it is, the question arises: Is its *fulfilment*, or compliance with it, a condition precedent to the performance of the contract, or is it simply an independent agreement? If a condition precedent, non-compliance justifies repudiation of the contract; if an independent

[90] Ry. & M. (Eng.) 337 (1825); 1 M. & S. (Eng.) 593 (1813); L. R. 9 Q. B. (Eng.) 494 (1874).
[91] 4 Kern. (N. Y.) 93 (1856).
[92] 4 Metc. (Ky.) 363 (1863).
[93] 7 Kans. 161 (1871).
[94] 1 Mas. (U. S.) 437 (1818).
[95] 54 Fed. Rep. 32 (1895); 148 U. S. 345 (1892).

[n] See *The Law of Contracts:* Discharge of Contracts by Performance.

agreement, it does not affect the contract but gives the aggrieved party a right of action.

74. Where, in a contract of sale, the seller agrees to deliver certain goods to the vendee upon a day named, it is a condition precedent that the seller shall go to the purchaser on the day fixed and offer the goods to him whereupon arises the obligation of the buyer to perform his part of the contract. Should the seller fail or refuse to deliver the goods, as agreed, the buyer would be justified in refusing to take them at some other time or in some other manner; that is, he may repudiate the contract. Conditions of this kind must be performed before any obligation will rest upon the other party to fulfil what he has promised in return.[96]

But failure to perform a condition precedent will be excused where the party entitled to its performance has waived or in any way hindered or obstructed its performance.[97] Hindrance of performance, voluntarily rendering oneself unable to perform, or absolutely refusing to perform, amount, in reality, to an implied waiver. So, also, does a refusal by the vendee to accept performance of the vendor.[98] Where a publisher, who has engaged an author to contribute articles to his periodical during a space of several months, ceases to publish the magazine before the expiration of the period for which the author has been hired, the author is under no obligation to tender to the publisher performance on his part. "But a mere assertion that the party will be unable or will refuse to perform his contract is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made, for if he afterwards continue to urge or demand compliance with the contract, it is plain that he does not understand it to be at an end."[99]

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[96] 3 W. & S. (Pa.) 299 (1842).

[97] Benj. Sales (7th Ed.), p. 551.

[98] 10 East (Eng.) 359 (1808); 8 Q. B. (Eng.) 14 (1872).

[99] Benj. Sales (7th Ed.), p. 551, quoted with approval in 15 Wall. (U. S.) 36, p. 48 (1872).

75. A positive refusal of performance by one of the parties will release the other from his obligation;[100] so, where the thing contracted for has ceased to exist, for example, where a horse intended to be sold has died, and in general, where performance of the contract has become impossible.[101]

ILLUSTRATION.—By the terms of a contract of sale, all the oil on board a certain vessel on arrival in Great Britain was to be delivered by the sellers on a wharf to be appointed by the buyers with all convenient speed, but "not later than the 30th day of June next." The ship containing the oil arrived the 4th of July. It was decided that the arrival by the 30th of June was a condition precedent and that the buyer was justified in refusing to accept the oil.[102]

76. "The general rule in executory agreements for the sale of goods is, that the obligation of the vendor to deliver, and that of the buyer to pay, are concurrent conditions in the nature of mutual conditions precedent, and that neither can enforce the contract against the other without showing performance, or offer to perform, or averring readiness and willingness to perform, his own promise."[103] Where the stipulation has reference to the time of performance, it will be considered a condition precedent, if time appear, from the circumstances and intentions of the parties, to be of the essence of the contract.[104]

77. Contracts of sale are frequently made providing for the delivery of the goods in instalments. In general, if the contract be entire, failure to deliver the first instalment is such a breach of a condition precedent as will discharge the purchaser from any liability for refusal to accept subsequent instalments.[105]

ILLUSTRATION.—A contract of sale was for 5,000 tons of iron rails at $45 per ton. It was stipulated that they should be shipped from an European port, or ports, at the rate of about 1,000 tons per month, beginning February, 1880, but the whole to be shipped before August 1,

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[100] 86 Ill. 13 (1877).
[101] 11 East (Eng.) 210 (1809); Shep. Touch. 173, 182; 2 Ex. (Eng.) 595 (1848).
[102] Ry. & M. (Eng.) 406.
[103] Benj. Sales (7th Ed.), p. 575; 2 B. & P. (Eng.) 447 (1801); 2 B. & Ad. (Eng.) 882 (1831); 1 C. B. (Eng.) 222 (1845).
[104] 60 N. Y. 557 (1875).
[105] 115 U. S. 188 (1885).

1880, to be paid for in cash on presentation of bills, with the custom-house certificate of weight. Only 400 tons were sent in February, 885 in March, and 1,571 in April, and the entire 5,000 tons were shipped before August 1, 1880. The purchaser had accepted and paid for the first 400 tons, ignorant that this was the entire instalment. When he learned of the small shipments of February and March, he refused to accept any further shipments. In the meantime the price of iron had fallen and the vendor, having sent the entire 5,000 tons before August 1, 1880, sued the vendee for not accepting. It was decided that failure to send about 1,000 tons in February and March was a breach of a condition precedent which entitled the buyer to avoid his contract. As he had accepted the first 400 tons in ignorance of the circumstances, that was not such a waiver as excused breach of the condition.[106]

78. Warranty.—A **warranty** is an undertaking by the seller that certain facts concerning the article which he sells are or will be true. It may be express, that is, the vendor may say in so many words: "I warrant the goods," or it may be implied from his actions at the time of the sale, or (in particular cases) it may arise from the fact of the sale itself. It differs from a mere statement or representation in that, by it, the seller warrants or undertakes absolutely that the article sold possesses certain attributes. Should the goods not possess the attributes warranted, the buyer can sue for breach of warranty. Suppose that the subject of the sale is a horse of which the vendor says, "I warrant him to be sound in every way." If the horse prove to be lame, there is a breach of warranty for which an action will lie. The warranty, therefore, is a collateral agreement, made a part of the contract by mutual consent of the parties. It is not a necessary part of it, for a sale is not less a sale because there is no warranty. On the other hand, a mere representation, unless fraudulently made, gives rise to no action.[107]

ILLUSTRATION.—On the day preceding an auction sale of horses, a buyer entered the stables of the seller to inspect one of the animals. The seller, believing the truth of what he said, stated, "You have nothing to look for; I assure you he is perfectly sound in every respect." The plaintiff (the buyer) accordingly made no

[106] 115 U. S. 188 (1885); 12 R. I. 82 (1878).

[107] 13 Wend. (N. Y.) 277 (1835).

further examination. The following day the auctioneer put the horse up without a warranty and he was sold to the plaintiff. He proved unsound. The statement of the seller was held to be a mere representation, or expression of opinion, which had not been made part of the contract by the buyer when he bid for the horse.[108]

79. Express Warranty. — The warranty must be given at the time of the sale. With regard to quality, none is implied from the mere fact of sale. *Caveat emptor* (let the buyer take care) is the general rule (to which there are many exceptions) applied to contracts of bargain and sale.[109] But there is an implied warranty of title, since a sale is the transfer of the property in a thing, and only the owner of property (with the exceptions named) is able to make such a transfer of it; by the very act of selling, he warrants his ability to sell. The form of the warranty is of no consequence; it is the intention of the parties that makes it such.[110]

A general warranty, one, for example, that the goods are sound or perfect in every way, does not extend to facts known to both parties at the time of the sale, or that would have stood revealed upon simple inspection. In such a case, no wrong nor deceit is practiced upon the buyer.[111] One who buys a horse, knowing it to be blind in both eyes, cannot afterwards sue upon a general warranty of soundness. But, if the defect in the article can only be discovered by the exercise of peculiar skill or training, the purchaser may rely on the general warranty, though possessed of such skill or training.[112]

80. Implied Warranty of Title. — In an executory agreement of sale, the vendor impliedly undertakes that the title to the goods is in him. If it be a sale, it is a transfer of title, and the seller can transfer the title of no one but himself.[113] Where the sale is a present actual transfer, the vendor's assertion that the property is his is a warranty of title; his conduct may give rise to such a

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[108] 15 C. B. (Eng.) 130 (1854).
[109] 14 M. & W. (Eng.) 664 (1845).
[110] 3 T. R. (Eng.) 51, 57 (1789).
[111] 7 Bing. (Eng.) 603 (1831); 8 Bing. (Eng.) 454 (1832).
[112] 3 Camp. (Eng.) 462 (1813).
[113] 19 Conn. 341 (1848); 85 Ill. 16 (1877).

warranty by implication.[114] But the act of selling does not make him liable as a warrantor, for he may have no title and yet be ignorant of it. Were he to sell the property, knowing that he has no title, it would be fraud, on which ground the buyer might obtain redress.[115] It is the general rule, that where a person having property in his possession, sells it as his own, he by implication warrants his title to it, and is liable if he be not owner, irrespective of whether he be aware of the defect in his title.[116] This is certainly the rule in the United States, and is considered by the modern authorities to be also the rule in England.[116] The principle is thus stated by one of the authorities: "In all ordinary sales the party who undertakes to sell exercises thereby the strongest act of dominion over the chattel which he proposes to sell, and would, therefore, as I think, commonly lead the purchaser to believe that he was the owner of the chattel."[117]

Opinion differs as to whether a sale of goods, not at the time in possession of the vendor, carries with it a warranty of title. In England, it has been said that no distinction exists; that a sale of things, in possession or not in possession of the vendor, raises the presumption of a warranty.[118] In the United States, in many cases, a distinction has been observed; a sale of things in the possession of the vendor is held to imply a warranty of title, a sale of things not in possession, to imply no warranty.[119] Later cases weaken the distinction to the extent of holding that possession or lack of possession simply raises a presumption the one way or the other.[120]

81. Implied Warranty of Quality. — There is no implied warranty of quality of an article in existence at the time of inspection by the buyer before making the purchase.[121] In a sale of this kind, the courts, both of England

114 41 Md. 389 (1874).
115 83 Pa. 426 (1877); 17 C. B. N. S. (Eng.) 708 (1869).
116 Schoul. Per. Pr., Vol. 2, Sec. 378.
117 Benj. Sales (7th Ed.), 629.
118 17 C. B. N. S. (Eng.) 708 (1864).
119 36 Me. 501 (1853); 10 Barb. (N. Y.) 445 (1851).
120 62 N. Y. 329 (1875); 51 Ind. 62 (1875).
121 2 East (Eng.) 314 (1802); 14 M. & W. (Eng.) 652 (1845).

and of the United States, uniformly hold that the rule of *caveat emptor* applies. One notable exception to this statement is the state of South Carolina, where the courts have never recognized any such doctrine. It is there held that "selling for a sound price raises, in law, a warranty of the soundness of the thing sold; and this warranty applies to all faults known to the seller."[122] Judicial sales, such as those by a sheriff or a master, cannot from their nature, even in South Carolina, imply any warranty.[123]

It is different where an order is given for the manufacture of goods. When the manufacturer undertakes to fill the order, he impliedly warrants that the goods furnished will be suitable for the purpose for which the purchaser designs them.[124] A bargain and sale of a thing answering to a particular description implies a warranty that the article sold is of that description.[125] Moreover, the goods must be marketable or merchantable; they must be of such quality that they could be disposed of, if need were, to persons dealing in such articles.[126] Cases of sale by description, by sample, or of sales of goods for a particular use, constitute other exceptions to the rule of *caveat emptor*. The question of implied warranty arises in contracts of this nature, placing the burden of inspection, etc., upon the seller instead of the buyer.

82. Sales by Sample.—Where a merchant exhibits a sample of goods and sells by it, he tacitly agrees that the bulk of the articles supplied shall be equal in quality to the sample.[127] This is also true where he has undertaken to supply goods in accordance with a sample submitted by the customer. It is essential to a sale by sample, that both parties have reference to the sample shown and intend the article sold to be like it.[128] In the case of goods manufactured to order, should the sample contain some defect of

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[122] 1 Bay (S. C.) 324 (1793); 27 S. C. 376 (1887).
[123] 1 Hill (S. C.) 287 (1833).
[124] 27 Vt. 227 (1854); 149 N. Y. 137, 601 (1896); 1 Stark (Eng.) 504 (1816).
[125] 5 B. & Ald. (Eng.) 240 (1821).
[126] 88 Hun (N. Y.) 246 (1895).
[127] 60 Cal. 284 (1882); 114 Mass. 123 (1873)
[128] 5 N. Y. 95 (1851); 63 Minn. 478 (1895).

manufacture unknown to both parties, not obvious upon mere inspection, the goods supplied should be selected upon the supposition that the sample is free from defects.[129] But in a sale of existing goods by sample, it is only necessary that the article supplied should correspond in the bulk with the sample, the seller not warranting either the sample or the bulk to be free from defects not apparent upon inspection.[130]

83. Delivery.—Delivery has already been treated, considered as a transfer of title. When all the other obligations resting upon both parties have been discharged, it remains for the seller to deliver the goods. Delivery is used to denote different acts with reference to the goods. It may signify (1) the transfer of title, without reference to possession of the goods; (2) the physical change of possession (and possession is divided into actual and constructive possession); (3) the change of possession required by the statute of frauds.[131]

The sale of personal property, generally speaking, confers upon the purchaser the right to physical possession of the goods. This right may be subject to the performance of certain conditions, only upon *fulfilment* of which does the right become absolute. The condition may be payment of the purchase money, in which event the buyer cannot insist upon delivery without offering to pay.[132]

Where the contract is silent upon the subject, it is not the duty of the vendor to send the goods to the vendee. It is sufficient that he hold himself in readiness to deliver them to the buyer at any time he may call for them.[133] The property in the goods has passed to the buyer, who is at the risk of their destruction. Should the establishment of the seller be destroyed by fire, he is none the less liable for the purchase money.[134] If further acts are to be done by the

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129 12 App. Cas. (Eng.) 284, p. 296, *et seq.* (1881).

130 13 Mass. 139 (1816); 5 Johns. (N. Y.) 404 (1810).

131 See *The Law of Contracts:* Statute of Frauds.

132 4 B. & C. (Eng.) 941 (1825).

133 11 Hun (N. Y.) 597 (1877); 139 Mass. 531, 535 (1885); 1 Black (U. S.) 476 (1861).

134 1 Black (Ind.) 353 (1825).

buyer before delivery, he cannot maintain an action for failure to deliver until he has notified the vendor of performance of these acts. Where goods are to be delivered on board a certain ship when the buyer is ready to receive them, he cannot complain of non-delivery until he has designated the ship and signified his readiness. The rule operates both ways; the vendor cannot compel acceptance of the goods, unless he has done all the acts required of him.[135]

ILLUSTRATIONS.—A buggy was built to special order for a vendee, whose name was placed upon it, after which it was set apart and kept for him at the vendor's shop. A fire having destroyed the buggy, it was decided that this was such a delivery as entitled the vendor to recover the purchase price.[136]

A wagon was sold at auction and pointed out to the bidder, who was told that he could take it away. This was held a sufficient delivery.[137]

But these rules contemplate only such articles as are fully identified and separated as belonging to the vendee. If the goods need to be further separated, or to have something done to them to prepare them for delivery, no title passes.

ILLUSTRATION.—Four barge loads of oil were sold at so much per barrel, the barges to be furnished by the vendee. Before any of the barges were completely filled, barges and oil were destroyed by fire. It was decided that here there was no delivery, the sale being of barge loads and there not being one barge completely loaded when the fire took place and the loss, consequently, fell on the vendor.[138]

A quantity of lumber was sold and the price paid. It was selected and piled together to distinguish it from other lumber in the vendor's yard, and while there was destroyed by fire. It was held that the title to the goods, and, consequently, the risk had passed to the buyer, although the vendor had said he would deliver to the cars free of charge.[139]

84. Delivery as Against Creditors.—A delivery to a carrier for conveyance of the goods to the vendee, if not done fraudulently, is a good delivery against creditors.[140] But, where the rights of creditors are involved, the mere fact that the vendor remains in possession of the goods is of

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[135] L. R. 7 C. P. (Eng.) 651 (1872); 21 W. R. (Eng.) 264 (1873.)
[136] 115 Mass. 450 (1874).
[137] 19 Ark. 567 (1858).
[138] 56 Pa. 322 (1867).
[139] 47 Minn. 422 (1891).
[140] 53 Ark. 196 (1890).

itself sufficient to invalidate the sale, even where no fraud is charged.[141] It has been decided, however, that possession of the goods by the vendor, unless fraud be charged, does not affect the validity of the sale.[142]

DUTIES OF THE VENDEE

85. Acceptance.—In a contract of sale, the vendee's principal duties are to *accept* the articles that he has bought and to pay for them.[143] In the absence of a special agreement for delivery, it is the duty of the buyer to fetch away the goods within a reasonable time, failing which he may be held liable for storage and other charges incident to storing the goods. But a fair opportunity of inspecting the goods should be given the buyer, and it is sufficient grounds for avoiding the contract that the seller refused to let him compare the bulk with the sample, or that the goods were sent in a closed cask which the seller refused to open.[144] To recover his purchase money, the seller need not prove an actual acceptance; any facts from which acceptance may be inferred, such as that the buyer raised no objection to the goods while they were in course of delivery, will be sufficient to charge him with the price.[145]

PAYMENT AND TENDER

86. The manner in which the articles bought are to be paid for depends upon the agreement of the parties. There are three possible ways of making payment: (1) In *cash;* (2) by a conditional payment in *some medium other than money;* (3) by *giving credit* for a time agreed upon.

87. Payment in Cash.—The terms of payment are taken to be **payment in cash** when the bargain is concluded, unless the parties have made some especial provision upon the subject. Where the vendor is bound to make

141 17 Mass. 110 (1821).
142 16 Conn. 346 (1844).
143 3 Camp. (Eng.) 426 (1813); 3 C. P. Div. (Eng.) 316 (1878).
144 100 Mass. 523 (1868); 48 Md. 244 (1877).
145 65 N. H. 209 (1889).

delivery, the vendee must make payment concurrently with receiving the goods. Some stipulation with reference to payment or delivery is equally made a part of the contract; so long as these stipulations are legal, they are the controlling consideration. Payment in counterfeit money or forged securities is not a valid payment, and it is immaterial that it was made honestly or in ignorance that the money was bad.

88. Payment in a Medium Other Than Money. If payment be made by *check*, it is conditional upon the buyer's having funds in the bank. Should the buyer withdraw the funds from the bank before allowing a reasonable time to elapse within which to present the check, it is no payment. It is the duty of the person taking the check to present it duly for payment at the bank. If he fail to do this and the bank becomes insolvent, he is merely a creditor of the bank but has no rights against the drawer of the check.[146]

In some of the United States, the giving of a promissory note or other negotiable instrument is *prima facie* payment, which may be modified or rebutted by evidence of the intention of the parties and the circumstances under which the transaction was effected.[147] But in the majority of the states, there is no presumption of payment, unless it can be proven that the bill or note was taken as payment.[148] The fact that the bill or note was taken as payment is material for the reason that when the note is taken as payment, it extinguishes the original cause of action (that on the contract of sale) and confines the creditor, or seller, to an action on the negotiable instrument; if taken as conditional payment only, the seller, upon dishonor of the bill or note, may have recourse to his original action and, consequently, to any securities that he may have taken for the debt.[149] There is likewise a difference of opinion concerning the effect of

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[146] 114 Mass. 71 (1873); Stat. 45, 46, Vict., c. 61, Sec. 74 (1882); see *The Law of Commercial Paper:* Checks, Presentment for Payment.

[147] 131 Mass. 467 (1881); 153 Ind. 510 (1899).

[148] 98 Ill. 27 (1881); 123 Mass. 37 (1887).

[149] 98 Pa. 13 (1881); 154 Pa. 549 (1893), 195 Pa. 309 (1900).

payment by the negotiable note of a third person, some courts regarding it as conditional payment, others as an absolute payment. In England, the governing consideration is the intention of the parties. Unless it be shown that the bill or note, whether of the buyer or of a third person, was taken as absolute payment, it is regarded as conditional payment.[150]

89. Where Credit Is Given.—In sales on credit, the title to the goods vests immediately in the buyer, the seller, by mutual agreement, being obliged to wait for his money. Where no fixed time is set for payment, it must be made within a reasonable time.[151]

90. Tender.—A **tender** is an offer by the purchaser to pay for the goods. To constitute a good tender, the offer should be accompanied by a production of the money, unless the parties have agreed upon a substitute, a check, for instance, or some other medium.[152] But an offer to give a check is not ordinarily a good tender.[153] Nor is an offer to pay part of the purchase-money a good tender, unless accepted by the vendor.[154]

Interest ceases to run or to accumulate from the time of making a valid tender.[155] It may have the effect, also, of divesting the vendor of the title to the goods, as where by the terms of the sale the vendor is to retain title until payment.[156]

REMEDIES FOR BREACH OF CONTRACT

REMEDIES OF THE SELLER

91. Where Property Has Not Passed.—For refusal of the buyer to accept and pay for the goods when offered, the seller's only remedy is an action for damages for non-acceptance. His only loss is the failure to dispose of his goods; they are still in his possession and he may, if he like,

150 15 M. & W. (Eng.) 23 (1846); 7 B. & C. (Eng.) 73 (1827).
151 Schoul. Per. Pr., Vol. 2, Sec. 422.
152 6 Pick. (Mass.) 356 (1828); 80 Mich. 149 (1874).
153 67 Miss. 133 (1889).
154 39 N. J. Law 413 (1877).
155 134 U. S. 68 (1889).
156 110 Ala. 322 (1895).

sell them to some one else. The basis of his recovery, therefore, is the damage he has sustained.[157] In the United States, it is generally held that upon refusal of the buyer to accept the goods, the seller may sue for the whole price notwithstanding he retains possession of the goods.[158]

92. Where the Property Has Passed. — The buyer's refusal to pay after having been put in possession of the goods does not enable the seller to rescind the contract. He must have recourse to a personal action; that is, he is simply a creditor of the buyer and must bring suit for the price.[159]

REMEDIES AGAINST THE GOODS

93. Seller's Lien. — While the goods remain in the possession of the seller, although the title has vested in the buyer, the former has a lien on them for the purchase-money. He is not obliged to surrender possession of his property until he is paid for it.[160] Furthermore, he is justified in refusing to deliver the goods if he hear of the insolvency of the buyer before the latter has made payment.[161]

94. Termination of Lien. — If the seller part with possession of the goods, he waives his lien, in the absence of some contrary stipulation.[162] Where the goods are sold on credit and the title is understood to vest immediately in the vendee, the seller has no lien, and this although the goods remain on premises of the vendor leased by the vendee, who has become bankrupt.[163]

95. Stoppage in Transitu. — The law gives the seller one other remedy against the goods, which he may exercise even after having delivered them out of his possession, namely, the right of **stoppage in transitu.** This is the right of the seller to intercept the goods, if he can, while they are in the hands of a common carrier in course of transportation to the buyer, should he become aware of the

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157 55 E. C. L. (Eng.) 604 (1846); 67 Hun (N. Y.) 38 (1893); 74 Hun (N. Y.) 569 (1893).
158 84 N. Y. 549 (1881).
159 41 E. C. L. (Eng.) 595 (1841); 6 B. & C. (Eng.) 360 (1827).
160 142 Ind. 448 (1896).
161 70 Pa. 443 (1872).
162 96 U. S. 619 (1877).
163 115 Mass. 515 (1874)

latter's insolvency.[164] It differs from a lien, which ceases to exist when the seller surrenders possession of the goods.[165]

96. By Whom Exercised.—The right of stoppage *in transitu* may be exercised not only by the seller, but by a consignor or any one who is entitled to look to the buyer for payment. The right is not lost by acceptance of a partial payment.[166] Acceptance of securities for the purchase price or of anything in lieu of payment will, however, deprive the seller of his right. He may also waive his right of stoppage or he may by contract agree not to exercise it.[167]

97. Against Whom Exercised.—The circumstances that justify the vendor in exercising the right are insolvency of the buyer or general inability to meet his obligations. An insolvent buyer is the only person against whom the right may be exercised.[168] The meaning here given to insolvency, however, is quite broad. It has been held that such an act as failure to pay a debt when due is sufficient to justify the vendor intercepting the goods. Anything that satisfies the mind of the vendor that the buyer's ability to meet his obligations is doubtful is good ground for taking such action.[169]

98. When Transit Begins and Ends.—The goods are considered in transit from the time when they are delivered to the carrier, or person who is charged with their delivery to the time when they are handed over to the buyer or his agent. When the seller's lien for the purchase-money ends, his right of stoppage *in transitu* begins. "Goods are deemed to be *in transitu* not only while they remain in the possession of the carrier, whether by water or land, and although such carrier may have been named and appointed

164 See *The Law of Bailments:* Carriers of Goods.
165 2 Hawaii 428 (1861).
166 13 Me. 93 (1836).
167 32 Vt. 58 (1859); Schoul. Per. Pr., Vol. 2, Sec. 569.
168 14 Pa. 48 (1850); 8 Pick. (Mass.) 205 (1829).
169 43 N. H. 580 (1862); 14 B. Mon. (Ky.) 324 (1853).

by the consignee, but also when they are in any place of deposit connected with the transmission and delivery of them, and until they arrive at the actual or constructive possession of the consignee."[170] An interruption of the transit, such as delivery of the goods by the original carrier to a warehouseman or other agent of the vendee preparatory to forwarding them through a connecting carrier, may operate to defeat the right.[171] Whether the right will be divested or not depends upon the intention with which the goods were delivered to the agent. If he took them simply as a forwarder, the right is not affected;[172] if he took them as an act of the vendee to reduce them to his own possession the right is lost; in other words, it is the privilege of the vendee to defeat the right by intercepting the goods.[173]

Where the vendor has transferred a bill of lading for the goods to the vendee and the latter has sold the goods and transferred the bill of lading for a valuable consideration to a third person, this also will defeat the right of stoppage *in transitu*.[174] This is one of the few instances in which a man can give to a third person a better title to property than he himself possesses. The vendee's right to the property was liable to be defeated by the vendor's exercise of his right of stoppage *in transitu;* the right of his transferee is indefeasible.[175] This is subject to the qualification that the original sale must not be affected with fraud.

99. Mode of Exercising the Right.—Stoppage *in transitu* is usually effected by notifying the carrier of the seller's claim. It should be given to the person in control of the goods, such as the master of the ship or railroad freight agent, seasonably, and should be expressed plainly. So given, it operates to revest the property in the seller; he is once more in constructive possession of the goods and

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170 Ab. Sh., Pt. 3, c. 9, p. 374 (5th Ed.); and Pt. 4, c. 10, p. 409 (12th Ed.).
171 15 B. Mon. (Ky.) 279 (1854).
172 27 Barb. (N. Y.) 658 (1858); 17 N. Y. 249 (1858); 86 N. Y. 167 (1881).
173 15 Q. B. Div. (Eng.) 39 (1885).
174 1 Sm. L. C. (8th Am. Ed.), p. 1,207; 28 Barb. (N. Y.) 223 (1858).
175 38 Am. Dec. 422 (1842); 105 U. S. 7 (1881).
176 Schoul. Per. Pr., Vol. 2, Sec. 565.

his lien attaches.[176] The carrier has no discretion in the matter. It is his duty to obey the order of the seller; the latter is responsible for any wrongs that may happen, and it is at his peril that the right is exercised. If, in spite of the orders of the seller, the carrier proceed to deliver the goods, the seller's rights are not affected.[177]

It is generally conceded that the effect of the exercise of the right of stoppage *in transitu* is not to rescind the contract, but to set the parties and the transaction back to the point they had reached when the goods were delivered to the carrier. The vendor becomes again one who has goods in his possession which he has sold, but for which he has not been paid.[178] If it were a rescission, the seller's duty would clearly be to restore any part payment he might have received. Actually, he is not put to any such necessity. It is his privilege to resell the goods and if any surplus remain he must turn it over to the buyer. Likewise, he is entitled to look to the buyer should the resale result in a deficit.[179]

REMEDIES OF THE BUYER

100. Failure to Deliver.—The buyer has a right of action against the seller for failure to deliver the goods, provided the terms of the contract entitle him to possession.[180] His measure of damages, or the basis upon which damages are assessed, is the difference between the price agreed upon and the market price of the goods at the time and place of delivery contemplated by the agreement.[181] The object of the damages being to indemnify the buyer against loss, this is estimated to be what it would have cost him to go promptly into the nearest market and procure the same kind of goods for the purpose designed by him. If the parties fixed no time for delivery, the buyer should demand the goods before bringing suit.[182]

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176 7 Taunt. (Eng.) 168 (1816); 7 App. Cas. (Eng.) 591 (1882).

177 44 N. Y. 661 (1871); 16 Pick. (Mass.) 475 (1835).

178 15 Me. 314 (1839).

180 67 Barb. (N. Y.) 192 (1875).

181 9 C. B. N. S. (Eng.) 632 (1861); 66 N. Y. 92 (1876); 44 Md. 396 (1875); 88 N. C. 554 (1883).

182 Schoul. Per Pr., Vol. 2, Sec. 572.

101. Where Goods Are Not of the Quality Contracted For. — The rights of the buyer, in the event of the goods supplied him being inferior in quality, have been to some extent considered.[183] Considerable difference of opinion exists with reference to the appropriate action of the vendee where the quality is not that contracted for, owing to the diverse views taken of warranty and condition in the United States and in England. Many of the incidents of a sale, called *conditions* in England, are, in the United States, designated *implied warranties*. The effect of this, upon failure of the goods to come up to the standard required, is to make the course open to the buyer depend on the view taken in his particular jurisdiction. If delivery of inferior goods be breach of warranty, the buyer's duty is to accept the goods and sue on the warranty; if a breach of a condition, he can refuse to accept the goods and repudiate the contract.[184]

In England, stipulations concerning the quality of the goods are rendered as collateral to the contract on matters of warranty, and the buyer, therefore, is not entitled to repudiate the contract. This rule is followed in some of the United States. In others, the buyer may elect to treat the warranty as a condition subsequent upon breach of which he may repudiate the contract.[185] But it is generally conceded that the buyer may keep the goods, and, if inferior in quality, may sue for breach of warranty.[186]

EXCHANGE OF PERSONAL PROPERTY

102. Exchange, or barter, is the giving of one thing or commodity in return for another.[187] In its essentials and in the rules of law applying to it, it does not differ from a sale. The difference extends only to the consideration; it is a transfer of goods for goods instead of goods for money.[188]

An exchange is a contract and is regulated by the general

183 See *subtitles* Warranty, Conditions, *supra*.

184 L. R. 2 Q. B. (Eng.) 447 (1867).

185 98 Mass. 209 (1867); 53 Iowa 399 (1880); 67 Me. 78 (1877).

186 52 N. Y. 416 (1873); 66 Pa. 340 (1870); Schoul. Per. Pr., Vol. 2, Sec. 583.

187 Cent. Dict.

188 124 Mass. 478 (1878); 49 Mo. App. 2[illegible] (1892).

rules of contract law. The parties must have contractual capacity; there must be a meeting of the minds, and there must be a consideration. Like a contract of sale, a contract for the exchange of property may be conditional or absolute, executed or executory. The effects of delivery, tender, and acceptance, in passing title, are the same as those already detailed in the case of sales.

ILLUSTRATION.—A mule was exchanged for a horse and delivery had taken place on both sides, when the former owner retook possession of the horse and sold him to a third person. It was held that the third person took no title by the sale, as the exchange and delivery had divested the vendor of all title to the horse.[189]

There is a mutual undertaking that the property exchanged belongs to the person transferring it; that is, in the absence of express stipulations to the contrary, there is an implied warranty of title and of freedom from incumbrance; but there is no implied warranty of quality.

It has been held that where in a contract of barter the parties have reduced the goods to be exchanged to a money value, the elements of a sale are present since the transaction is made upon a money basis.

ILLUSTRATION.—An exchange was effected upon these terms: The vendor sold to the vendee a gun for forty-five guineas, agreeing to accept in part payment a gun of the defendant valued at thirty guineas. Upon the vendee's failure to pay for the gun, it was decided that the transaction had all the characteristics of a sale and that as the buyer had not paid for the gun in the manner agreed upon, he could be sued for the cash price.[190]

103. There is a difference between a contract of sale and a contract of exchange with respect to the remedy that may be brought for breach of the one or the other. For failure or refusal of the buyer to pay in a contract of sale, the seller may bring his action for "goods sold and delivered." But no such action will lie for breach of a contract of exchange; the proper remedy is an action for breach of an agreement to deliver goods.[191]

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[189] 5 Watts (Pa.) 201 (1836); 81 Ga. 89 (1888).

[190] 1 Stark (Eng.) 437 (1816).

[191] 3 Camp. (Eng.) 352 (1813); 12 N. H. 390 (1841).

The difference in the remedy for the breach of the two contracts is made necessary by the fact that the basis upon which damages are assessed is different. For breach of a contract of sale, the vendor receives damages based upon the value of the goods at the time of the sale. On the contrary, when the agreement to deliver the goods in a contract of a barter is broken, the damages are based upon the value of the goods at the time they were to have been delivered.[192]

The rights of the parties with respect to rescission, and the circumstances under which either of the parties is entitled to rescind, are similar to their rights upon breach of a contract of sale. A contract of exchange may be avoided for fraud, mistake, or any of the other incidents that make all contracts void or voidable.

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[192] 12 N. H. 390 (1841).

THE LAW OF PROPERTY

(PART 5)

PERSONAL PROPERTY—(Continued)

CHATTEL MORTGAGES

1. Definition.—A **chattel mortgage** is a transfer of chattels as security from one person, usually a debtor (the mortgagor), to another, usually his creditor (the mortgagee), on condition that it is to be void on payment of the debt, or in some other specified contingency, the transferrer, meanwhile, retaining possession of the property.[1] The title is fully vested in the mortgagee and can be defeated only by the due performance of the condition; upon a breach, the mortgagee may take possession and treat the chattels as his own.[2]

2. Distinguished From Similar Transfers.—A chattel mortgage is said to be a conditional sale of chattels as security for a debt or the performance of some other obligation, the sale to be void upon performance of the condition named.[3] However, there is this difference: In a conditional sale, the purchaser has merely a right to purchase, and no debt or obligation exists on the part of the vendor.[4] The understanding in a conditional sale is that, until the purchase money is paid in full, the title shall remain in the seller.[5] The distinguishing test is the existence or nonexistence of a debt upon completion of the transaction; if

[1] Cent. Dict.
[2] Jon. Chat. Mort., Sec. 1; 52 Barb. (N. Y.) 367 (1868); 12 Neb. 66, 69 (1881).
[3] Jon. Chat. Mort., Sec. 1.
[4] 40 Miss. 462 (1866).
[5] 82 Va. 903 (1886).

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no debt remain, it is a conditional sale.[6] Where the conveyance takes the form of a transfer of title as security for a subsisting indebtedness, it is a mortgage.[7]

3. A chattel mortgage is also defined as "an absolute pledge, to become an absolute interest if not redeemed at a fixed time"; but there is a significant difference between the two instruments.[8] In a *chattel mortgage*, the title is vested in the mortgagee, subject to defeasance upon the performance of the condition; while in a *pledge*, the title remains in the pledgor, and the pledgee holds the possession for the purposes of the bailment.[9]

4. There is a wide difference between a *mortgage of lands* and a *mortgage of chattels*. In the former, the estate, subject to the mortgage, remains in the mortgagor, is bound by a judgment, and may be sold under an execution, against him. But a mortgage of personal chattels, in all cases, vests the legal title in the mortgagee, and when, by the terms or legal construction of the instrument, he has an immediate right to the possession, he is, in judgment of law, the absolute owner, and it is merely as his bailee and by his sufferance that the mortgagor retains the possession. The latter has no interest that is bound by, or can be sold by, an execution against him. When, by the terms of the mortgage, the mortgagor is to remain in possession for a certain time, his temporary interest, subject to the mortgage, may be levied on and sold, but his interest, in other cases, is a right of redemption only, a mere chose in action which, unless united to a right to the possession for a definite period, can never be the subject of a levy and sale under an execution.[10]

5. Bottomry and Respondentia Bonds. — When a ship or vessel is mortgaged, the term employed in modern commercial usage to denote the contract is *hypothecation*, and the

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[6] 57 Wis. 410 (1883).
[7] See *subtitle* Sales of Personal Property *supra*.
[8] 2 Cai. Cas. (N. Y.) 200 (1867), by Kent Ch. (Eng.).
[9] 24 Wend. (N. Y.) 116 (1840); 1 Pet. (U. S.) 449 (1828).
[10] 6 Duer (N. Y.) 99 (1856).

instrument by which the transaction is affected is a *bottomry bond*. **Bottomry** is the act of the owner of a ship, or the master, as his agent, in borrowing money to carry on a voyage and the pledging of the ship's keel or bottom, in fact, the ship itself, as security for the repayment of the loan. If the ship be lost, the lender loses the money;[11] but if the ship arrive safe, he is to receive the money with the interest agreed upon, though it exceed the legal rate of interest. This is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender. The ship, her tackle, apparel, and furniture (and the freight, if specially pledged) are liable for the debt in case the voyage or period is completed in safety. The borrower is also liable, if the bond pledge his personal responsibility and the ship arrive.[12]

When money is loaned on the goods laden on board the ship (the cargo), the borrower is said to take up the money at **respondentia,** so called because the borrower is bound personally to answer the contract, the money being lent mainly on the personal responsibility of the borrower.[13] If the goods be lost, the lender loses his money; if the goods arrive safely at the end of the voyage, though the ship perish, the lender is entitled to the sum borrowed, with the interest agreed upon. The instrument by which this transaction is effected is called a *respondentia bond*.[14]

These contracts differ materially from ordinary loans. Upon a simple loan, the money is wholly at the risk of the borrower; but in *bottomry* and *respondentia*, the money, to the extent of the perils mentioned, is at the risk of the lender during the voyage on which it is loaned or for the period specified. Upon an ordinary loan, the legal rate of interest only can be reserved; but upon *bottomry* and *respondentia loans*, any rate of interest, not too extortionate, which may be agreed upon, may be legally contracted for.[15]

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[11] 2 Hagg. Adm. (Eng.) 48 (1827).

[12] 2 Black. Comm. 457, 458; 157 Mass. 132 (1892); 48 Barb. (N. Y.) 269 (1867).

[13] 1 Pet. (U. S.) 386 (1828).

[14] Newb. Adm. (U. S.) 514 (1855); 1 Pet. (U. S.) 437 (1828).

[15] Bouv. Law Dict.

THE PARTIES

6. The rules as to the competency of parties, stated with reference to real-estate mortgages, are equally applicable in the case of chattel mortgages; the mortgagor must have contractual capacity, and the mortgagee must be capable of holding title to property.[16] The competency of parties to enter into contracts generally is treated under the general article on contracts, to which the student is referred.[17]

7. Authority of Partners.—One partner may, without the consent of his copartners, execute a chattel mortgage of firm property to secure a firm debt;[18] and he may give a chattel mortgage of his interest in the partnership without thereby causing a dissolution.[19] A chattel mortgage upon partnership property to secure an individual debt, or upon individual goods for a firm debt, is not valid as to creditors;[20] and individual property is not included in a mortgage by partners of their property,[21] unless it be specially set forth and described.[22]

8. In Bottomry Bonds.—In a contract of bottomry, the owner of the ship is always competent to give the bond. The instrument may also be given by a master appointed by the charterers of the ship, by masters necessarily substituted or appointed abroad, or by the mate who has become master on the death of the appointed one.[23] But while in a port in which the owners, or one of them, or a recognized agent of the owners, reside, the master, as such, has no authority to make contracts affecting the ship, and a bottomry bond executed under such circumstances is void;[24] but in England, the bond will be valid if given by the master, though in the port where the owners reside, if he have no means of communicating with them.[25] The master has authority

16 See *subtitle* Mortgages *supra*.
17 See *The Law of Contracts*.
18 8 Allen (Mass.) 102 (1864).
19 38 Kans. 362 (1888).
20 18 Minn. 232 (1872).
21 49 Mich. 501 (1887).
22 43 Ga. 527 (1871).
23 3 Sumn. (U. S.) 246 (1838).
24 1 Wash. C. C. (U. S.) 49 (1803).
25 1 Dods. (Eng.) 273 (1812).

to hypothecate the vessel only in a foreign port. In the United States, however, all maritime ports other than those of the state where the vessel belongs are foreign to the vessel.[26]

THE CONSIDERATION

9. A mortgage is usually given to secure an existing indebtedness, or an indebtedness created at the same time as the mortgage.[27] It may also be given to secure future advances, provided enough appear on the face of the mortgage to put a prospective purchaser or other third person on inquiry.[28] A mortgage to secure future advances, at the option of the mortgagee, is a new mortgage at every advance made upon it, and he is bound by all liens filed at that time. The lien only attaches from the date of the advance and not from the date of the mortgage, and a chattel mortgage cannot be extended to cover other matters or debt.[29]

THE FORM

10. In **form,** a chattel mortgage differs little from a mortgage of real estate. It is usual to give a note for the amount of the debt, secured by a deed executed at the same time known as the *mortgage-deed.* The deed purports to be an absolute bill of sale, describing the goods with a covenant of warranty. A clause of defeasance is next inserted, providing that if the note, debt, or other obligation (reciting it) shall be duly paid by the mortgagor, his executors, administrators, and assigns, then the sale or conveyance shall be void. Provision is sometimes made in the body of the deed concerning possession of the mortgaged property.[30]

The note secured by the mortgage-deed generally sets forth the time when the condition is to be considered broken or fulfilled. In case of a promissory note, payable "according to its tenor" on a day certain, overdue at the time, "the

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26 Bouv. Law Dict., citing 1 Cliff. (U. S.) 308 (1859).

27 77 Mich. 517 (1889).

28 34 Mich. 418 (1870); 21 Hun (N. Y.) 53 (1880); 11 Ore. 406 (1884)

29 81 Ill. 607 (1876).

30 Schoul. Per. Pr., Vol. 1, Sec 415

condition will be understood to be the payment of the note in its then existing state, or virtually on demand." Where no time is fixed, a reasonable time is presumed.[31]

11. The property to be given as security need not be so specifically described in the mortgage as to be capable of identification by that alone.[32] To identify the chattels (as between the parties) oral evidence may be admitted.[33] But extrinsic evidence may not be given to include new chattels, that is, chattels not specifically mentioned in the instrument itself, within the mortgage.[34] To bind third parties, the mortgage itself should afford means of identifying the property, without the introduction of outside testimony.[35]

THE SUBJECT-MATTER

12. Almost any kind of personal property, corporeal or incorporeal, may be made the subject of a chattel mortgage. It has been said that whatever may be sold or pledged may likewise be mortgaged. This would include very nearly everything over which dominion may be exercised.[36] Statutes regulating chattel mortgages exist in all of the United States, except Louisiana; but, in some states, the statutes restrict their operation to specific classes of property.[37]

13. With reference to after-acquired property, the rule is not uniform. It is generally agreed that there is a distinction between a mortgage of the products of property owned by the mortgagor at the date of the execution of the instrument and a mortgage of property to which he has no right at the time, but in which he expects to acquire a future ownership.[38] A mortgage in the first case is valid; in the second case, it is invalid. Thus, if a mortgage be made of a stock in trade, it will not at law cover additions afterwards

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[31] 1 Schoul. Per. Pr., Vol. 1, Sec. 419, citing 7 Cush. (Mass.) 456 (1851); 10 Md. 217 (1856).
[32] Jon. Chat. Mort., Secs. 53, 54, 56, 66, 67.
[33] 74 Ind. 495 (1881).
[34] 74 N. C. 600 (1876).
[35] Jon. Chat. Mort., Secs. 64, 64*a*.
[36] L. R. 12 Eq. (Eng.) 78 (1871).
[37] See Cal. Civ. Code, Secs. 2,955, 2,958; Laws of Ariz., Sec. 3,644; P. L. of Pa. 1876, 1887, 1891; and Stats. of Wyo., Mich., Conn., and N. H.
[38] 10 H. L. C. (Eng.) 191 (1862).

made to the stock, though it be expressly framed to cover additions to the stock intended to be made to replace such as should be sold. This is everywhere conceded to be the general rule at law. But even when void as against creditors and subsequent purchasers, such a mortgage is valid as between the parties thereto, and as to others who stand in the same or no better position.[39] The subject-matter of the mortgage must be in existence and capable of being identified, for, as a rule, a mortgage of after-acquired property is void at law as against third parties in adverse interest, unless the mortgagee take actual possession of such property before any adverse interests have fastened upon it, or obtain constructive priority under a new mortgage.[40]

14. In equity, however, a different rule prevails. There, while such mortgage itself does not pass the title to such property, it creates in the mortgagee an equitable interest in it, which will prevail against judgment creditors and others, although the mortgagee have not taken possession of the property, and the mortgagor have done no new act to confirm the mortgage. The basis of the doctrine is that the mortgage, though inoperative as a conveyance, is operative as an executory agreement, which attaches to the property when acquired, and in equity transfers the beneficial interest to the mortgagee, the mortgagor being regarded as a trustee for him, in accordance with the familiar maxim, that equity considers that done which ought to be done.[41]

FORMAL REQUISITES

15. In most of the United States, the formalities required in the execution of a chattel mortgage are set forth in statutes.[42] So far as the parties are concerned, the form of the mortgage is immaterial.[43] It is equally enforceable if

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[39] Jon. Chat. Mort., Sec. 138, citing 2 Cush. (Mass.) 294 (1848); 5 Mo. App. 322 (1878); 20 Hun (N. Y.) 265 (1880); 71 N. Y. 113 (1877).

[40] Schoul. Per. Pr., citing 21 Wis. 417 (1867); 8 Md. 301 (1855); 131 Ill. 68 (1889).

[41] Jon. Chat. Mort., Sec. 170, citing 10 Mo. App. 290, 299 (1881); 11 R. I. 476 (1877); 10 H. L. C. 191 (1862).

[42] 63 Ala. 508 (1879).

[43] 50 Ala. 388 (1894); 9 Wend. (N. Y.) 80 (1832).

created orally or if reduced to writing.[44] Defective descriptions in the written instrument may be supplied by parol testimony, although no new property may thus be brought under the lien of the mortgage.[45] The word *mortgage* may or may not be used, but the use of the word *pledge*, where the intention to mortgage is plainly shown, does not alter the character of the instrument.[46]

There must be an indebtedness existing between the parties at the time of the execution of the mortgage,[47] irrespective of the existence of any obligation or promise to pay it.[48] And it is immaterial that the debt is overdue, or that the time set for payment has gone by.[49]

It is not essential that the mortgagor be the absolute owner of the property;[50] a person may create a mortgage in such interest in the property as he possesses.[51] If he have a conditional interest in the property, no mortgage he may put upon it will extend beyond his interest.[52] Nor is possession necessary, for one may mortgage property that he has previously pledged, although, in this case, the pledgee ought to be notified.[53]

16. Delivery and Registration.—**Delivery** of the chattels and **registration** of the mortgage-deed are largely matters of statutory regulation.[54] Whether a mortgagee's rights be assured or not as against the mortgagor without registration of the instrument,[55] this formality is indispensable to bind third parties whose rights may conflict with his own.[56] Delivery of chattel mortgages is a formality that should be observed; failing such transfer of possession, the statutes require a recording of the deed to give force to the transaction, for, without such regulations, transfers of this kind might easily become the vehicles of frauds on creditors.[57] A person might mortgage his chattels, retain

44 7 Metc. (Mass.) 244 (1843).
45 12 N. H. 205 (1873).
46 4 Duer (N. Y.) 107 (1854); 11 N. H. 955 (1841).
47 68 Tex. 91 (1887).
48 15 N. H. 109 (1844).
49 61 Ala. 468 (1878).
50 32 Ark. 435 (1877).
51 28 Vt. 746 (1856).
52 18 B. Mon. (Ky.) 501 (1857).
53 52 Iowa 389 (1879).
54 37 N. H. 428 (1859).
55 12 Cush. (Mass.) 109 (1853).
56 31 Mo. 437 (1862).
57 12 Fla. 166 (1867).

possession of them, and obtain a fictitious credit from their possession as great at least as the value of the goods. Hence, the recording, which is public notice of the transfer, is accepted as a substitute for a change of possession.[58] In some states, the statutes require registration from time to time to make the mortgage binding against subsequent purchasers.[59]

17. The object of the recording, as has already been stated, is to give notice to the world or to interested parties of the condition of the title to the property.[60] But the manner in which knowledge or notice is conveyed to interested third parties is not material. If it can be proved that they have had actual notice, the instrument will bind them whether recorded or not[61]. Between the parties themselves, the title of the mortgagee is considered imperfect, unless the instrument be recorded, or a transfer of possession of the goods take place; if there be a change of possession, registration is not required. The validity of the instrument cannot be impeached by the mortgagor because of failure to record it, nor because of delaying in doing so.[62]

In the United States, no mortgage (hypothecation) of a vessel is valid against third parties without notice, unless recorded in the office of the collector of customs of the port where the vessel is enrolled.[63] As between parties and those who have notice, registration is not required.[64]

18. Transfer of Possession.—The change of possession that may be substituted for recording of the mortgage must be such a transfer as the property admits of.[65] Where the property is incapable of manual delivery, either by reason of its nature or of its situation, the mortgagee's rights may be asserted by such acts as indicate an assumption of ownership.[66] It is sufficient, for example, to bar the rights

58 101 U. S. 731 (1879); 1 C. P. D. (Eng.) 722 (1876).
59 37 N. Y. 198 (1867).
60 *Ibid.*
61 22 Ill. 395 (1859).
62 30 Wis. 81 (1872).
63 Rev. Stat., Sec. 4,192, etc.
64 Bouv. Law Dict., citing 100 U. S. 145 (1879).
65 Schoul. Per. Pr., Vol. 1, Sec. 427.
66 97 Mass. 452 (1867).

of third persons, that the mortgagee has had his agent take possession of the goods, although he permitted them to remain on the premises of the mortgagor.[67] Mere want of delivery does not of itself invalidate the transaction.[68] The possession by the mortgagor of the chattels mortgaged simply raises a presumption of fraud, to counteract which, evidence of the real nature of the transaction is admissible.[69]

If a conflict of interest arise between several mortgagees whose deeds are unrecorded, the rights of the parties are determined by the date of the execution of the instruments. Where recorded, the deeds take priority in the order in which they were offered for registry.[70]

RIGHTS AND DUTIES OF THE PARTIES

19. The execution and recording of the mortgage-deed has the effect of vesting the right of possession in the mortgagee. His rights in the property, it has been seen, are not absolute, but conditional and subject to defeasance.[71] They constitute, however, such ownership as confers upon him the power to bring any of the actions for possession of the goods commonly attached to absolute ownership.[72] The number of securities for the debt which the mortgagee may hold is unlimited. He is entitled to all the immunity from loss that he is able to obtain.[73]

These principles do not apply to cases in which the agreement gives the mortgagor the right of possession until breach of condition or until some other specified time; the mortgagee, not being in such case entitled to possession of the goods, can bring no action for possession.[74] But he has a right that may ripen into a right of possession and may take steps to prevent his security from being diminished or demolished.[75] So, if the mortgagor make such use of the property as tends to consume it or destroy its usefulness, he may by bill in equity restrain its continuance.[76]

67 1 Pet. (U. S.) 386 (1828).
68 4 Mass. 515 (1827).
69 109 Ind. 254 (1886).
70 37 Barb. (N. Y.) 571 (1862).
71 35 N. Y. 274 (1866).
72 49 Me. 213 (1860).
73 57 Pa. 360 (1868).
74 22 N. Y. 225 (1860).
75 47 Me. 9 (1870).
76 12 Md. 1 (1857); 12 N. J. Eq. 93 (1858).

20. The mortgagor may dispose of such interest as he possesses, and his right is liable to sale on execution to this extent.[77] If he sell the property, it will be subject to the encumbrance, and an attempt by him to dispose of the entire title to the property will not divest any of the mortgagee's rights; and this, whether detrimental to the claims of innocent purchasers or not.[78]

Subsequent liens of any kind put upon the property by the mortgagor cannot take precedence of the encumbrance of the mortgagee.[79] There is an exception in the case of a lien given by force of law, that of a bailee hired to repair the thing, for example, whose lien must be satisfied before that of the mortgagee.[80] Fraudulent out-and-out sales by the mortgagor are made the subject of criminal statutes in some states, such sales being made indictable offenses.[81]

Where the mortgagee has possession of the mortgaged chattels, until default has been made, he is held strictly to account for the manner in which he deals with it.[82]

21. Assignment.—The assignability of mortgages in most jurisdictions is regulated by statute. Assignments are usually required to be recorded, and the rules in this connection are as exacting as in the case of the mortgage itself. The assignee's rights and liabilities under the assignment are the same as those of the original mortgagee. He is only bound, however, by such equities existing between the original parties as the record discloses. Equities not of notoriety or known only to the parties themselves do not bind him.[83] Where a note has also been given for the debt, the assignment of the mortgage should be accompanied by a transfer of the note or other acknowledgment of indebtedness to the assignee.[84]

22. Rights and Liabilities of Parties After Default.—Upon default by the mortgagor, the title to the

77 5 Ohio St. 92 (1855).
78 35 N. Y. 274 (1866); 41 Mich. 307 (1879).
79 28 N. Y. 252 (1863).
80 94 U. S. 382 (1876); 10 C. B. N. S. (Eng.) 417 (1861).
81 1 Jon. Chat. Mort., Secs. 454, 471.
82 22 Conn. 299 (1853).
83 37 Ill. 164 (1865).
84 48 Mich. 411 (1882).

goods vests, without further action on his part, in the mortgagee.[85] It is his duty to secure possession of the property, and, if he be negligent in asserting his rights in this respect, they may be defeated by the intervening rights of creditors.[86] The obligation to pay the principal sum may be evidenced by several notes for smaller amounts falling due successively.[87] Where the debt is thus payable in instalments, a default in the first payment entitles the mortgagee to foreclose or take possession of the property. Nor does he lose his rights by failure to take possession at the first default; he may wait for the maturity of the last note. In some of the United States, the statutes provide that only so much of the mortgaged property shall be taken or sold upon forfeiture as will be sufficient to satisfy the instalment upon which default has been made. The courts of other states apply a similar rule without any express legislative enactment upon the subject.[88]

A contrary rule obtains in the majority of the states, where the mortgagee is empowered to sell the entire property upon default in the first instalment. The mortgage-deed itself usually contains some clause touching this matter.[89]

If no time of payment be named in the deed, the mortgagee may take steps to gain possession immediately, without making any previous demand of payment on the mortgagor. It has been held that where no time is specified for payment, a reasonable time is intended.[90]

23. Foreclosure of Chattel Mortgages.—The foreclosure of a chattel mortgage is not attended with the formality that usually accompanies foreclosure of a mortgage of real estate. Where the mortgage covers property of considerable value, the mortgagee may, if he wish to secure himself, adopt the formal method, and obtain possession of the chattels or sell them by means of a foreclosure.

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85 54 Me. 558 (1867).
86 18 Ark. 575 (1857).
87 37 Ill. 164 (1865).
88 Jon. Chat. Mort., Sec. 767.
89 *Ibid.*, Sec. 768.
90 10 Md. 217 (1856).

Usually, however, he simply sells the chattels or takes possession of them.

24. Mortgagor's Right of Redemption. — In the event of formal foreclosure, much of the real distinction between chattel mortgages and real-estate mortgages is lost.[91] The statutes by which foreclosure, either formal or informal, is regulated, sometimes grant the mortgagor a right to redeem within a certain time after default, postponing the vesting of property in the mortgagee until the mortgagor has had an opportunity to pay the debt.[92] Even after the sale, should the proceeds exceed the debt, the mortgagor is entitled to the surplus.[93]

The real character of the transaction must not be neglected. The mortgage is in reality a mere security for the debt, and when the debt is extinguished, the reason for the existence of the mortgage is gone. If the property be of such a nature that it may yield a profit, the mortgagee's rights cease when the accrued profits are equal to his debt, interest, and costs. But the mortgagee cannot be compelled to satisfy his debt in any particular way. It is his privilege to proceed on the note given for the debt, on the mortgage itself, or on both.[94]

PAYMENT

25. The effect of a payment by the mortgagor, after forfeiture, if accepted by the mortgagee, is to revest the title to the property in the mortgagor.[95] At common law, a mere tender, unaccepted, after forfeiture, does not affect the title of the mortgagee.[96] But, if the tender were made at a proper time, this throws responsibility for loss or damage of the property upon the mortgagee.[97] If made after forfeiture, but before the mortgagee has taken possession of the property or commenced foreclosure proceedings, it is a good tender.[98]

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[91] 54 Me. 558 (1867).
[92] 5 Fla. 452 (1854).
[93] Jon. Chat. Mort., c. 17.
[94] 24 Iowa 351 (1868).
[95] 47 N. Y. 423 (1872).
[96] 38 How. Pr. (N. Y.) 296 (1869).
[97] 11 Neb. 147 (1881); 14 Ala. 114 (1848).
[98] Jon. Chat. Mort., Sec. 632 *et seq.*

CONFLICT OF LAWS

26. A chattel mortgage, valid and duly registered under the laws of the state in which the property is situated at the time of the mortgage, will be held valid in another state to which the property is removed, although the statutory regulations there be different; and it will be enforced in the state to which the property is removed, although it would have been invalid if made in that state.[99]

Chattel mortgages are governed, however, by the *lex rei sitae* (the law of the state where the property is situated), and a lien is extinguished when mortgaged goods are taken from the place where the lien was created to a place where such a lien is not recognized. Thus, a chattel mortgage made in Maryland was held invalid in Pennsylvania as against a *bona fide* purchaser without notice; and a Louisiana court refused to enforce a chattel mortgage made in another state, such mortgages being unknown in Louisiana.[100]

ASSIGNMENT OF PERSONAL PROPERTY

27. Personal property may be transferred by **assignment.** The term is used to denote transfer of all kinds of personal property, *corporeal* and *incorporeal*, *choses in possession*, and *choses in action.* Corporeal personal property is, and always has been, assignable by a transfer of possession accompanied by circumstances indicating an intention to change the ownership; but incorporeal personal property, or *choses in action*, until a comparatively recent period, was incapable of transfer by way of assignment. The assignment of such rights as debts and demands was discouraged at common law, because it was believed to promote litigation.[1] A debt is at the present time as freely assignable as any corporeal right, although it is preferable to effect the transaction by means of a deed or some other instrument

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[99] Bouv. Law Dict., citing 13 Pet. (U. S.) 107 (1839); 62 Mo. 524 (1876); 25 Miss. 471 (1853); 30 Mo. 383 (1860).

[100] *Ibid.*, citing Whart. Confl. L., Sec. 318; 26 La. Ann. 185 (1874): see *The Law of Contracts:* Interpretation, What Law Governs.

[1] 3 Cow. (N. Y.) 623 (1824).

in writing.[2] And, in general, not only debts, but any kind of incorporeal personal property, may now be assigned, subject to the restrictions imposed in a few cases by statute, regarding rights of which it is still considered impolitic to permit assignments.[3] Bills of exchange, promissory notes, checks, and, in general, all negotiable instruments, are assignable.[4]

28. Definition.—To *assign* personal property means to transfer the ownership thereof to another. An assignment, in this connection, is the transfer of personal property. The term *assignment* is also used to designate the instrument or writing of transfer.[5]

REQUISITES OF AN ASSIGNMENT

29. As a general rule, anything written, said, or done, in pursuance of an agreement, and for a valuable consideration, or in consideration of some preexisting debt, to place a money right or fund out of the original owner's control, and to appropriate in favor of another person, amounts to an assignment.[6] The form of the instrument is of no moment; the essentials are a consideration and an intention to convey the interest. Where there is an appropriation of a particular fund or of a particular right, whatever its form, this will constitute an assignment which equity will sustain.[7]

Delivery of the property assigned is not essential, except where there is a written evidence of debt. But, if the assignment itself be written and delivered, this is sufficient to pass the title. An assignment of an account, in whole or in part, may be made by oral agreement, without writing, if on a valid consideration. Where a note, bond, or other written obligation evidencing a debt, is assigned, the instrument must be delivered.[8]

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[2] Schoul. Per. Pr., Vol. 1, Sec. 73.

[3] 86 Mich. 266 (1891) 7 Wall. (U. S.) 113 (1868).

[4] See *The Law of Commercial Paper:* General Remarks; Negotiation.

[5] Cent. Dict.

[6] Schoul. Per. Pr., Vol. 1, Sec. 77; 5 Wheat. (U. S.) 277 (1820).

[7] 51 N. H. 407 (1871); see *The Law of Contracts:* Form of Assignment.

[8] 83 N. Y. 318 (1881).

PARTIES

30. An assignment generally involves the existence of three parties: the person owing the obligation, or *debtor;* the creditor, or *assignor;* and the person to whom the right is transferred—the *assignee.* The debtor, however, plays no part in the transaction other than that he is entitled to notice.[9] As between the assignor and the assignee, the transaction is complete when the instrument of transfer, or the acts which constitute an assignment, has been executed, but the assignee's right is an imperfect one until the debtor has been notified. Moreover, his inchoate right will be defeated if the debtor pay, or offer *bona fide* to pay, the assignor before receiving notice of the assignment. After having been notified, however, his obligation is toward the assignee, to whom alone a payment in discharge of the indebtedness can be made. In some of the United States, the rule as to notice is not so strict. In such jurisdictions, the assignee may prevent a payment by the debtor by giving notice of his title, and this, although the rights of subsequent attaching creditors have intervened. Notice need not be formal; it may be actual or constructive. Where the rights of parties are conflicting, those affected with notice of any kind cannot take advantage of want of notification of the other parties.[10]

An assignee takes the right assigned subject to any equities that may exist between the original parties. If the debtor were able to set off some obligation due him by the assignor against the assignor, he may equally well set it off against the assignee. On the other hand, the assignment is presumed to include any collateral security that the assignor may have received as indemnity against non-payment.[11]

ENFORCEMENT OF ASSIGNEE'S RIGHTS

31. At common law, when the assignee proceeded to enforce his rights, suit had to be brought in the name of the assignor for the benefit of the assignee. Statutes, in many

[9] 10 Conn. 444 (1835).

[10] 10 Paige (N. Y.) 409 (1843); 4 Metc. (Mass.) 594 (1842); 10 Conn. 444 (1835).

[11] 40 N. Y. 181 (1869); 38 Cal. 263 (1869).

jurisdictions, now enable the assignee to sue in his own name on the ground that he is the real party in interest. In others, it amounts to little more than a requirement that the name in which the suit is brought shall be that of the assignor.[12]

REGISTRY

32. In some of the United States, assignments, where no delivery of the property has been made, or where the property is incapable of delivery, are required to be recorded to give them priority.[13] An assignment of a patent or copyright must be registered.[14]

The principles of assignment in general comprise an important part of the law of contracts, wherein assignable interests and the rights of parties to assignments are fully treated.[15]

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[12] 14 Ill. 33 (1882); 44 Pa. 356 (1863).

[13] 17 R. I. 183 (1892); 152 U. S. 634 (1893).

[14] Rapalje & Lawrence Law Dict., p. 88, Sec. 3.

[15] See *The Law of Contracts:* Persons not Parties to Contracts, Assignment.

THE LAW OF WILLS

DEFINITIONS AND KINDS

1. A **will,** or **testament,** is the disposition of one's property to take effect after his death; it is the legal declaration of a man's intention that he wills to be performed after his death. The words *will* and *testament* have the same meaning, the former being most commonly used, though this kind of instrument is generally referred to as a *last will and testament.*

The maker of a will is called the *testator*, if a man, and a *testatrix*, if a woman. A *devisee* is one to whom real estate is given by will; while a *legatee* is one to whom personal property is given; and a *devise* and *bequest* are gifts of real estate and personal property, respectively.

2. A **codicil** is a supplement to a will. It is used either to dispose of property which was not disposed of in the original document, because omitted or acquired subsequent to its date, or to make a new disposition of part or all of the property disposed of in the will. It is practically a new will as to the ground which it covers, and may be written on the same sheet of paper with the original will, or annexed to it in any way, but may also be a separate writing or instrument. Nevertheless, it is a part of the will, and must be read into it; and it and the main instrument constitute together but one will and testament. This is true, no matter how many codicils there may be.

3. There are two kinds of wills, *written* and *unwritten*, the latter being technically designated as *nuncupative*, a kind that is of rare occurrence, permitted only in a few instances.

For notice of copyright, see page immediately following the title page

A written will is, in most cases, essential to a valid disposition of property. In England and in most of the United States, statute law requires that all wills, except in a few instances, shall be in writing and formally executed in the presence of witnesses.

In some states, there are still recognized the **mystic testament,**[1] which is a written instrument by which a person disposes of his property and seals it in an envelope in the presence of witnesses, and the **holograph will,**[2] which is one written entirely by the testator, dated and signed by his own hand, and, being so written, formerly did not need the formality of attestation by witnesses; but in most of the United States, the statutory requirements apply to all wills alike, and these peculiar testaments are unknown.

FORMAL REQUISITES

4. The old distinctions required in disposing of the different kinds of property have been done away with almost everywhere, and real and personal property are disposable in the same manner and with the same formalities which are prescribed by statute, but vary in minor particulars. Generally, a will must be written; it must also be signed by the testator, unless prevented by the extremity of his last illness, or by some one in his presence and at his direction, and must be subscribed and attested, or at least *proved* by witnesses, usually two or three. If any of the statutory requirements be neglected, the will is of no validity.

EXECUTION

The **execution** of a will is the performance of all the conditions necessary to make it valid. It does not refer to the actual writing of the instrument, but to its proper signing, attestation, publication, and acknowledgment, when these are necessary. In Pennsylvania, where signing only is required, "the execution of a will, or other testamentary writing,

[1] La. Civ. Code, Art. 1,574, 5 Mart. (La.) 182 (1826). [2] Laws of Nev., c. 111 (1895).

consists in the act of signing it, in the mode prescribed by the statue, with the intention, and for the purpose of rendering it valid and operative as the will of the person signing, or by whose direction and in whose presence it is signed."[3]

SIGNING

5. The proper method of signing a will is to have the testator write his own name in full, or at least his Christian name and surname; but a will will be valid though signed only with the testator's initials, or his Christian name, though a sealing is not a sufficient signing.[4] The signature should also be written with the testator's own hand; but this, of course, is controlled by the necessities of the case. If, from illness, infirmity, or lack of education, the testator be unable to write his name, he may make a *mark*, or *cross*;[5] and he may even do this, though able to write, in the absence of statutory prohibition. When a will is signed with a mark, or cross, the testator's name should be written around it, for the sake of identification; but the writing of a wrong name will not invalidate the will. In case of illness, feebleness, or other disability, the hand of the testator may be guided by another in tracing his name, or making his mark;[6] and this may be done without a precedent request from the testator, though it is better to ask him if he wish assistance.

In some states, the name of the testator may at his request be written by another; and, in such case, that fact need not be stated, though it is better to do so: for example, A B, by C D, at his request; or C D, for A B, at his request.[7] It is also provided by statute in some states, that where the testator is prevented from signing by the extremity of his last illness, no signature is necessary.

6. Place of Signing. — In the absence of statute, the place of signing is immaterial, provided there be a clear intent that the signature was intended to apply to and

[3] 59 Pa. 501 (1860).
[4] 140 Ill. 649 (1892); 107 Iowa 723 (1898).
[5] 13 Pa. 396 (1850).
[6] 61 Pa. 196 (1869).
[7] 30 Pa. 218 (1858).

authenticate the whole will, and not merely the portion preceding the signature; it has been held that a will without a signature, but commencing: "I, A B, do hereby declare this to be my last will and testament," published in the presence of the attesting witnesses, was sufficiently signed.[8]

In many states, a will must be signed at the end; when this is the case, a signature which does not follow the last testamentary declaration is insufficient, and the will so signed is invalid; for example, when the testator appoints executors,[9] or gives his reason for making bequests,[10] in a clause following his signature. But the signature need not be placed at the physical end of the document in all cases. If the portions following the signature be intended to be inserted before it, and are so marked, or if there be added remarks not of a testamentary nature, such as the date of the execution,[11] the will will be valid.

A codicil, though read into the original will, is not an integral part of it; and, consequently, the appending of an unsigned codicil, even on the same sheet of paper, will not invalidate a will.[12]

7. The **acknowledgment** of the testator's signature is a substitute for his signing in the presence of the subscribing or attesting witnesses, and is necessary only where such witnesses are required, and the will has not been signed in their presence.[13] It need not be in any set form of words; it is sufficient for the testator to say "this is my will," or "this is my signature," or to answer in the affirmative to a question whether it be his will or signature;[14] and, if the will be actually signed by the testator, his mere production of it for the purpose of having the witness attest it is a valid acknowledgment.[15]

8. The **publication** of a will is the declaration by the testator in the presence of witnesses that the instrument is

[8] 21 Vt. 256 (1849).
[9] 118 Pa. 37 (1888).
[10] 6 Pa. 409 (1847).
[11] 79 Ky. 607 (1881); 15 Pa. 281 (1850).
[12] 31 Pa. 246 (1858).
[13] 47 Conn. 450 (1880).
[14] 79 Ky. 607 (1881).
[15] 33 Ohio St. 598 (1878)

his will.[16] It differs from an acknowledgment in that it does not take the place of signing in the presence of witnesses, but is an independent formality, and only necessary when expressly required by statute. It need not be made verbally; anything which calls to the attention of the witnesses that the instrument is the will of the testator, such as a mere gesture of the hand or a nod of the head in answer to a question, is sufficient.

SEAL AND DATE

9. A seal is not essential to the validity of a will, except in Nevada; nor need a will be dated, except it be provided by statute; but as a date is of great importance in establishing the fact that an instrument is the *last will* of the testator, when more than one are produced, as well as its validity, when the testator has become insane, or otherwise incapacitated, or undue influence is claimed, it is safer to insert it.

ATTESTATION AND SUBSCRIPTION

10. These words have quite different meanings. *Attestation* is the act of the senses, *subscription* the act of the hand. To **attest a will** is to certify the fact that it was published as such, or that the testator acknowledged his signature, or that the witness saw him sign; to **subscribe a will** is merely to write on the same paper the names of the witnesses for the purpose of identification.[17] Neither is necessary, unless required by statute.

In the absence of special statutory provision, a formal attestation clause is not requisite; all that is necessary is the use of the words *witness* and *attest;* and even the mere signing has been held sufficient.[18] The testator must request the attesting witnesses to sign; but he need not do so expressly. Any act which indicates that such is his desire, or an answer to a question, is sufficient. The witnesses need not sign on the same sheet on which the will is written.

[16] 36 N. J. Eq. 597 (1883). [17] 40 Ky. 117 (1840). [18] 140 Ill. 649 (1892).

11. In England, and in most of the United States, subscribing witnesses are required. In Pennsylvania, the law on this point is so peculiar as to require special mention. In that state, as a general rule, a will need neither be published, acknowledged, attested, nor subscribed,[19] but it must be *proved* by the oaths or affirmations of two or more competent witnesses who will swear to the testator's handwriting,[20] where there are no subscribing witnesses, or where the subscribing witnesses cannot be produced.[21] A will thus proved will be sufficient to pass real estate as well as personal property.

But a devise or bequest for religious or charitable uses is void, unless the will be attested by at least two credible and disinterested witnesses. If a will be written by a third person, and signed by a third person, without stating that the testator so requested, or by a mark, then subscribing witnesses, or persons present when the will was executed, must be produced; otherwise, there can be no sufficient proof. Thus, in Pennsylvania, where a testator had given complete directions for the drawing of his will, which had accordingly been put in writing in his lifetime, and he was prevented by the extremity of his last sickness from either signing it himself or giving express directions to another to sign it for him, it was held that the will was a good one, if otherwise established;[22] and as late as 1894, in that state, an unsealed, unattested scrap of paper, without date, although signed, which was found in the bedroom of one who had just died by his own hand, was declared to be testamentary in form and intended to take effect as a will.[23]

From the foregoing, and numerous other cases, the general principle may be deduced, that when a signed paper is found to have remained in the writer's possession up to his death, which contains a disposition of his estate in testamentary form, it is a good will, in Pennsylvania.

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[19] 1 Watts (Pa.) 463 (1833).
[20] 80 Pa. 170 (1875); 1 S. & R. (Pa.) 255 (1815).
[21] 1 Dall. (Pa.) 94 (1784).
[22] 27 Pa. 485 (1856); 123 Pa. 545 (1888); 131 Pa. 220 (1889); 190 Pa. 408 (1899).
[23] 164 Pa. 373 (1894).

READING OVER

12. If a testator be blind, or, through ignorance, be unable to read or understand the language of a will written by another, it should be read over and explained to him before he signs it, to avoid imposition;[24] if it be written in a language he does not understand, it should be accurately translated and fully explained. Unless required by statute, a will need not be read to the subscribing or attesting witnesses.

WHAT LAWS MUST BE COMPLIED WITH

13. The validity of a will, so far as personal property is concerned, is determined by the law of the place where the testator was domiciled (that is, where he was regarded in the eye of the law as having his true, fixed, and permanent home, to which, whenever absent, he has the intention of returning),[25] no matter where the property may be, since personal property, wherever actually situated, is regarded in law as being situated where its owner is; but so far as real estate is concerned, the law of the place where the real estate is situated governs. It is therefore advisable in all cases to execute a will with all the various formalities required in different localities, unless it be certain that the testator owns no property outside of the state where he is domiciled; and even then it is safer to observe these formalities, since he may subsequently acquire property elsewhere, which the will may not be sufficient to validly dispose of.

HOW A WILL SHOULD BE WRITTEN

14. A will should be legibly written, any language which the testator understands being permissible; even though he be ignorant of the language in which it is expressed, if the intention be stated with correctness, it is sufficient. It may be written on several sheets of paper, and a signing and

[24] 9 Md. 540 (1856).

[25] 10 Mass. 491 (1813); 4 Barb. (N. Y.) 505 (1848); 5 Metc. (Mass.) 587 (1843); 74 Ill. 312 (1874); 58 Conn. 275 (1890); 3 Ch. (Eng.) 192 (1892).

attestation on the last sheet will be sufficient, if intended to apply to all. A will written in lead pencil, or one typewritten or printed, fills the requirements of a written will.

NO SPECIAL FORM OF WORDS REQUIRED

15. Formerly, certain technical words were necessary to make a will operative in respect of particular species of property, *devise* being the technical verb by which to dispose of real estate, and *bequeath* being the technical word of disposition of personal property. For the supposed sake of clearness, and to avoid possible technical hindrances to the intended disposition, the word *give* was usually added; so that the full form of expression by which the testator's property in general was disposed of, was "give, devise, and bequeath," to which was frequently added "all my property, real, personal, and mixed." These expressions are still used, but they have largely lost their technical meaning, the object of the testator being of prime importance; and a will will be effectual to dispose of personal property if it "devises" it, as will be a will which "bequeaths" real estate.

The terms *devise* and *bequest*, used as names to denote the thing given by will, have also a similar technical meaning, which is likewise lost; and although they should be used with their appropriate meanings, a devise of personal property and a bequest of real estate will be equally valid, and will be given effect according to the true intent of the testator.

Consequently, no special form of words is necessary to be used in drawing up a will;[26] any instrument which clearly evinces a testamentary intent will be given that effect if the formal requisites have been complied with; for example, a mere letter expressing the wishes of the testator to be performed after his death, a memorandum of such wishes addressed to no one in particular, and the like. An instrument in the form of a deed will be given effect as a will if

[26] 10 Phila. 528 (1872).

testamentary and executed with the formalities of a will. But the instrument must be a completed and final one, and not merely a preliminary draft, and it must be clearly intended to take effect only on the death of the maker.

It is preferable to use the old formula "I give, devise, and bequeath all my property, real, personal, and mixed, whatsoever and wheresoever situated, to," etc., to avoid the possibility of dying intestate as to part of the estate.

16. Other technical terms should be studiously avoided by laymen; for when such terms are used, the law insists upon their having their legal effect, and that, owing to the ignorance of it by the draftsman, often results in defeating the real intent of the testator. "The jolly testator who makes his own will," is a favorite with the lawyers, on account of the business he makes for them; and novices in the art of drawing wills furnish many cases for the legal profession and the courts. Unless, therefore, the intended disposition is very simple, the drawing of wills should be entrusted to lawyers.

An example of a legal disposition of a man's estate, notable for simplicity and brevity, is furnished by a will probated in January, 1901. Not counting the testator's signature, it contained only eighteen words, and would have been valid with the first five omitted, as follows: "This is my last will. I leave all my property to my wife and make her my executrix."[27] Even the expression, "This is my last will," is unnecessary in view of Lord Mansfield's remark in 1775 (which is the law today) that "it is not necessary that the testator should declare the instrument he executed to be his last will." It is not necessary to the validity of a will that it appoint an executor.[28]

A will to take effect in the alternative is a good one, as where a testator made a will in November, 1871, and another early in January, 1873, and later made a codicil declaring his November will to be his last will, should he die before the

[27] Will of D. E. Olmstead (Williamsport, Pa.).

[28] 107 Iowa 723 (1898), citing 3 Bur. (Eng.) (1775).

first of March, 1873, otherwise the January will to be his last one; he died January 23, 1873, and the November will was declared to be his last one, the court intimating that in such a case, the alternate wills should be distinctly identified and the contingency definitely stated.[29]

17. There are, however, some special provisions that must be inserted to effect special dispositions of property. If it be desired to give a life interest only to a devisee or legatee, care must be taken that the property be given to some one else after the life estate terminates, and that it be not given to the *heirs* or *issue* of the life tenant, for otherwise the law will give the latter the entire estate, absolutely. If the object be to give the legatee or devisee the income of the estate only, without any control over the principal, it must be left to some one else *in trust* for him. If intended to prevent the income from being liable for the debts of the devisee or legatee, it should be left to some one else in trust for him, with directions to pay over the income to him only, and an added clause to the effect that the income "shall not be liable to anticipation, nor to the debts or liabilities of the said devisee or legatee, either now due or hereafter to be contracted, and his receipt to be the only discharge for the same." If the intention be to exclude a husband from any share in a devise or legacy to his wife, the devise or legacy should be expressed to be for her sole and separate use, free from the control of her husband she may now have, or may hereafter marry. If the desire be to dispose of any property over which the testator has only a power of disposition, that purpose should be expressed in the will; for, although in many states a general disposition of all the estate of the testator includes such property, there are states in which the common-law rule, which required specific mention of such property to effectually dispose of it, still prevails.

[29] 74 Pa. 69 (1873); 100 Pa. 612, 613 (1882).

WILL MUST DISPOSE OF PROPERTY

18. In the absence of statutory provisions to the contrary, a will must *dispose of the property* of the testator, at least in part; and an instrument which makes no such disposition, though executed with all the formalities of a will, will not be given effect as such. Thus, a paper executed with all the solemnity and formality of a will, naming a guardian for children, but not disposing of any property, nor having any posthumous effect, has not the necessary testamentary elements, and is not entitled to probate as a will.[30]

But an instrument which simply appoints an executor and authorizes him to sell real estate is a will; for, in such case, there is an implication that the maker's property is to descend and be distributed in accordance with the intestate laws of the particular place.[31] A letter to an undertaker, however, authorizing the cremation of the writer's body, and saying: "My brother P will take charge of the estate, and be the sole administrator, without bonds, to trade, sell, or occupy, as may seem to him fit," was held not to appoint an executor, nor make any devises, and, consequently, not to be entitled to probate as a will.[32]

NUNCUPATIVE WILLS

19. An unwritten, or oral, will is technically termed **nuncupative.** It is proved by the recollection of witnesses of the verbally expressed desire of the testator as to the disposition of his property. Resting thus entirely on oral evidence, such a method of disposing of property naturally opened a wide door to fraud and imposition, and at the most left a strong suspicion of uncertainty as to the testator's real desires, even when the witnesses were honest. It was consequently allowed, even at common law, only as to personal property, and even then only when the testator was in the extremity of his last illness, or under circumstances equivalent thereto; for example, in the military or naval service,

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[30] 14 Pa. 384 (1850); 46 Pa. 405 (1864); 169 Pa. 496 (1895).

[31] 17 Hun (N. Y.) 72 (1879).

[32] 118 Cal. 428 (50 Pac. Rep. 541, 1897).

or on the eve of execution of death sentence, and was required to be reduced in writing as soon as practicable thereafter.

20. Nuncupative wills are now prohibited by statute in many states, except in special instances. By the Pennsylvania statute, which is a fair sample of the rest, such a will can dispose of personal property only, and can only be made "in the last sickness of the testator and in the house of his habitation or dwelling, or where he has resided for the space of ten days or more, next before the making of such will, except where a person shall be surprised by sickness, being from his own house, and shall die before returning thereto"; and where the amount bequeathed exceeds one hundred dollars, proof is required that the testator bade the persons present to bear witness that such was his will; all the requisites mentioned must be proved by at least two witnesses who were present. Excepted from the operation of this statute are mariners at sea and soldiers in actual service, each of whom may dispose of his wages and personal estate, as at common law, such persons being regarded as in peril.[33]

Generally, lands cannot be disposed of by a nuncupative will; but, in Ohio, it is held that, under the statute law of that state, a nuncupative will made and proved in conformity thereto is sufficient to pass title to lands.[34] In Texas, also, the same statutory power exists.

The material facts surrounding the making of a nuncupative will must always be proved with exactness, as such wills are regarded with disfavor; and in order to entitle them to probate, each essential point must be established beyond doubt, more particularity being required than in the case of a written will.

TESTAMENTARY CAPACITY

21. As a general rule, any one of sound mind who is under no constraint, and who is of mature age, can dispose of his property, real and personal, by will. Formerly, certain

[33] Act of Apr. 8, 1833 (Pa.), P. L. 249.

[34] 12 Ohio St. 381 (1861).

classes of criminal convicts were incapable, by law, of disposing of their property by will, but, in the United States, the provisions in the national and state constitutions abolishing corruption of blood and forfeiture of estate, beyond the life of a person, for attainder of treason, or felony,[35] assures to all criminals, including a suicide and one under sentence of death, the right of disposition of property by testament.

22. *Aliens*, too, were formerly incapable of holding or transmitting property, real or personal, but legislation has long since removed such disabilities, subject, in some places, to compliance with certain formalities. For a century in Pennsylvania, aliens have been capable of acquiring real property by devise and descent, and of disposing of the same, as well as of disposing of personal property, by will or otherwise, in the same manner as a citizen may do.[36]

23. An *infant* is incapable of making a will. By the statutes of a majority of the United States and of England, the age of maturity is twenty-one years, and the will of a person under that age is invalid. In a few of the states, an earlier age is fixed as the time when incapacity in an infant ceases. In California, Connecticut, Dakota, Montana, Nevada, and Utah, eighteen years is the age at which a person may make a will,[37] while other states have designated a still earlier age as the time of mature discretion.[38] In some states, a distinction is made between the sexes, as in New York, where the age of testamentary capacity in males is fixed at eighteen and in females at sixteen.

24. *Married women* are now, by the legislative enactments of many of the states, possessed of unlimited testamentary power;[39] and they may thus dispose of whatever property they are permitted to hold by the law of the state in which they live.[40] In some states, this power is given to

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[35] Const. U. S., Art. III, Sec. 3.

[36] Act of Feb. 23 (Pa.) (1791); 3 Sm. L. 4, Sec. 1.

[37] See Statutes of states named.

[38] See La. Code, Secs. 1,476-7 and Gen. Stat. Ky., c. 113, Sec. 3.

[39] Act of Apr. 8, 1833 (Pa.), P. L. 249.

[40] 79 Pa. 377 (1875); 131 Pa. 228 (1890); 53 Ill. 495 (1870).

married women by implication, but, in most states, it is conferred by the express language of the statutes. The latest enlargement of a married woman's capacity in Pennsylvania was by the statute of 1893, which gives her the same right as an unmarried woman to acquire and dispose of all kinds of property, subject to a disability to mortgage or convey real estate, unless her husband join in the indenture.[41]

25. A person of *unsound mind* is incapable of making a will, if the unsoundness affect the disposition of his property;[42] but if it do not, either wholly or in part, he is possessed of testamentary capacity to the extent that his mind remains unaffected.[43] Moreover, temporary insanity, or mania as it is called, which lasts only for a season and is succeeded by lucid intervals, though it wholly destroy the mental faculties during the attack, will not affect testamentary capacity, unless it exist at the time when the will is executed.[44] Unsoundness of mind at that time is the proper test of capacity. If one be insane when the will is drafted under his direction, but execute it when sane, it is valid; if sane when it is drawn, but insane when he executes it, it is invalid.

26. When a man is *wholly insane*, or is insane to such a degree that his general faculties are affected, he is incapable of making a will. But it is now well established that partial unsoundness of mind, not affecting the general faculties, and not operating on the mind of the testator in regard to his testamentary dispositions, is not sufficient to establish his incapacity to will.[45]

27. The most common instance of partial unsoundness of mind is what is known as an *insane delusion*, that is an unfounded and irrational idea with regard either to the natural objects of the testator's bounty, whom he disappoints, or to those whom he favors by his will, which cannot be removed by argument or proof, and which is the

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[41] Act of June 8, 1893 (Pa.), P. L., p. 344.
[42] 1 Phila. 247 (1851).
[43] 11 Phila. 136 (1876); 45 Ill. 485 (1867); 48 N. J. Eq. 566 (1891).
[44] 53 Md. 376 (1879); 45 N. J. Eq. 726 (1889)
[45] 165 Pa. 586 (1895); 178 Pa. 57 (1896).

actual cause of the disposition made by his will.[46] An instance of this is a father's belief that his children have attempted to poison him, there being no evidence of any such attempt, by reason of which he omits them from his will.[47] But, if such a belief be merely based on mistaken ideas, without any impairment of the faculties, they will not establish mental incapacity, though the testator, through sheer obstinacy, refuse to let himself be argued out of them.

Beliefs in the supernatural cannot be reckoned as *insane delusions*, though they affect a man's disposition of his property,[48] unless they be clearly irrational, or result in securing a benefit to individuals; in the latter case, they belong to the category of undue influence. A belief in any religion is not of itself an insane delusion,[49] nor is a belief in witchcraft or spiritualism. If an insane delusion do not affect the will, it is no proof of incapacity.

28. Mere *feebleness of mind* is not incapacity; the fact that a person's mind has lost some of its former vigor or capacity from age or disease, or was never as strong as the normal mind, is not necessarily sufficient to impeach his testamentary capacity. The test of the capacity of a weak or feeble-minded person is whether he understood what he was doing, in making a will, and whether he grasped every detail of his act and made a rational disposition of his estate.

It is much the same with a person very ill, or in a dying condition; if, when aroused, he act with a clear intention of mind, showing discrimination, the capacity to make a will is sufficiently disclosed.

29. Other classes of insane persons who are incapable of making wills are *idiots* and *utter imbeciles*, no matter how they became such; the disability of such needs no explanation.

30. Persons *born deaf, dumb, and blind* were formerly classed as idiots, and capacity to dispose of property by will

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[46] 45 N. J. Eq. 726 (1889); 48 N. J. Eq. 566 (1891); 53 Md. 376 (1879).

[47] 38 N. J. Eq. 211 (1884).

[48] 90 Ky. 28, 29 (1890).

[49] 45 N. J. Eq. 726 (1889).

was denied them;[50] those similarly afflicted by accident were treated more liberally and were presumed capable, unless the contrary were proved. *Blindness* alone does not, of itself, incapacitate, if it do not appear that deception was practiced on the unfortunate;[51] nor is a *deaf mute* disqualified merely by reason of his infirmity, because such a person may possess sufficient intelligence to form the proper intention and exercise just discrimination. So, one who is deaf, dumb, and blind is not disqualified by law, if there exist in him sufficient intelligence to perform a valid testamentary act, though this must be proved clearly by competent witnesses.

31. One *under the influence of liquor* may be mentally deranged to an extent which destroys capacity while it lasts, and no testamentary disposition made while the derangement exists will be valid; but where a person has rallied from delirium produced by intoxicants, and his mind has cleared sufficiently to permit of his acting rationally, so that he comprehends what he is doing, his will is a good one.[52] The proper test is the state of the mind at the time the will is executed.

32. Cases of *delirium from fever* or other sickness are governed by a similar rule. It would be absurd to hold valid the will of a person made at a time when he was quite out of his mind from delirium, but many wills have been permitted by the courts to stand which have been made by persons very ill, who have just passed a period of delirium.[53]

33. A form of insanity called *dementia*, very like idiocy, and in some cases resembling imbecility, which medical experts have failed to describe by any positive characteristics and which embraces a wide range of infirmity, is frequently mentioned as a cause which produces incapacity to make a will.[54] Whether it be *senile dementia*, existing in the aged, or *dementia analogous to idiocy*, the application of

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[50] 41 N. J. Eq. 409 (1886).
[51] 6 S. & R. (Pa.) 489 (1821); 43 Pa. 73 (1862).
[52] 35 N. J. Eq. 461 (1882); 38 N. J. Eq. 211 (1884).
[53] 1 Phila. 246, 247 (1851).
[54] 46 Mo. 147 (1870).

the rules already stated as to unsoundness of mind, delirium, and mania generally will be applicable to ascertain capacity.[55]

34. Undue Influence.—The will of a weak-minded person, or one whose faculties are impaired by age or disease, may be attacked on the ground of *undue influence;*[56] that is, influence which overpowers the will of the testator, and makes his testamentary disposition in effect that of another. The most frequent class of these cases is where the influence is used to secure a benefit for the one who exercises the influence; but this is not an essential feature. Instances are where a spiritualistic medium, or a religious or legal adviser, secures a bequest to himself, to the injury of the testator's natural heirs, which the testator would not have given him, if left to himself. The question of insanity does not arise in these cases.

WHAT PROPERTY MAY BE DISPOSED OF BY WILL

35. In the absence of statutory restriction, and of mental unsoundness and undue influence, a testator may dispose of his entire property by will in any manner he pleases, although he entirely disinherit his children or the other members of his family. The harshness and inhumanity of a will is no proof of insanity or ground of interference. But in all English-speaking countries, certain limits are set to the testator's power. Thus, he cannot prevent his property from being sold or distributed for more than a life, or lives, in being (that is, in existence at his death), and twenty-one years thereafter, and, in some states, the period is less; he cannot direct the income to be accumulated beyond a certain period; bequests to charity or religion, to be valid, must be made a certain length of time before his death; and, in some states, he cannot give away to others than his children more than a specified portion of his property. The wife or husband, also, may generally claim a certain part of the property, though omitted from the will.

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[55] 77 Ill. 408 (1875).

[56] 65 Pa. 379 (1870); 140 Pa. 182 (1891).

REVOCATION

36. As a will is of no effect until after the death of the testator, and is subject at all times during his life to his desires, it may be changed or revoked at his pleasure, by his direct act, or without his desire, by the rules of law. This is called **revocation.** In most states, the mode of revocation is regulated by statute. Oral revocation is of no avail; and the power to revoke cannot be delegated to be performed by another after the testator's death.

37. The most effective method of revocation is by destroying the will; for example, by burning or tearing it, or by cancelation; but the destruction or cancelation must be by the hand of the testator himself, or in his presence and by his direction. The actual destruction of the instrument need not be effected; it was held sufficient to throw a will upon the fire, with the intention of burning it, though it was snatched away and preserved by a third party without the testator's knowledge.[57] But there must be some act done towards the destruction; a mere intent to destroy, not evidenced by any act, will not be sufficient; and, if the testator be stopped before he regards the revocation as complete, for example, before the will is torn completely across, it will be no revocation.[58]

A will may be partially revoked; but a partial revocation in anticipation of making a new will, and intended to be contingent upon that, will be ineffective.

A revocation induced by fraud, undue influence, or mistake, is not effectual; and the mere act of defacing a will without intending to revoke it, or under the misapprehension that a later will is good, will not operate as a revocation.[59]

The same capacity is requisite to revoke a will as to make one.[60] A testator, while insane, cannot revoke an existing will;[61] and the tearing of a will, while suffering from delirium tremens, has been held not to be a revocation.[62]

A will may be expressly revoked by a subsequent will or

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[57] 6 Ad. & Ell. (Eng.) 209 (1837).
[58] 3 B. & Ald. (Eng.) 489 (1820).
[59] 68 Md. 203 (1887).
[60] 7 Dana (Ky.) 94 (1838).
[61] 9 Gill (Md.) 169 (1850); 65 Cal. 19 (1884).
[62] (1893) P. (Eng.) 282; 3 L. R. P. &. D. 37 (1873).

codicil; and without any express language to that effect a later will will revoke a former one, since the *last* will prevails to the exclusion of all earlier ones, and a codicil will revoke a former will in so far as its provisions are inconsistent therewith. In a case where two contradictory wills were executed on the same day, both were held to be void; but it was said that if the two wills had presented any way by which the court could interpret a disposition, they would have been allowed to stand as one will. Where duplicate wills, executed on the same day are alike in their dispositions, the last does not revoke the first, but both operate as one will.[63]

A will may also be impliedly revoked in part by the alteration of the estate of the testator, or by the sale of a specific piece of land or personal property given to a devisee or legatee in kind.

A will will be revoked in part by operation of law, on the marriage of the testator, or on the birth of a child, not provided for in it. These causes of revocation are usually regulated by statute; and the various provisions on the subject are so numerous and conflicting that a detailed account of them would be idle.

REPUBLICATION

38. A will which has been revoked, but not destroyed, may be republished, that is, declared a second time to be in effect; but this **republication** must be an act of as high a nature as that which effected the revocation.[64] Thus, while a will which has been canceled, but not destroyed, may probably be republished by a simple declaration; a will revoked by a written declaration may be republished only by another written declaration to that effect, and not by mere word of mouth,[65] except in Pennsylvania.[66] A codicil expressly ratifying and confirming a will, either in whole or in part, will in so far amount to a republication, although the revocation were by marriage or birth of a child; but a codicil which does not expressly ratify and confirm will only

63 7 Bro. P. C. (Eng.) 443 (1851).
64 9 Johns. (N. Y.) 312 (1812).
65 2 Conn. 67 (1816).
66 2 Whart. (Pa.) 103 (1836).

republish the will so far as it is revoked by the act of the testator, and not so far as it is revoked by law.

The revocation of a subsequent will is presumed to indicate an intention to republish a prior uncanceled one,[67] unless the latter were expressly revoked by the former, in which case an express republication is necessary. Vice versa, the republication of a prior will revokes all subsequent wills and codicils.

JOINT WILLS

39. Two or more testators may, if they choose, unite in making a testamentary disposition of their property by a single instrument, known as a **joint will,** which is in effect the will of both or all, and, if properly executed, and intended to take effect upon the death of each, is entitled to probate on the death of either as his separate will. Joint wills are rarely made, except by tenants in common, for the purpose of disposing of the common property;[68] but they may also include property not owned in common. Such wills are revocable by either testator as to his own property, and a revocation by one will not affect the disposition made by the other, or others.[69]

40. Mutual Wills.—Mutual, or **reciprocal, wills,** as they are sometimes called, are joint wills, providing that on the death of either, his property shall go to the other. They are most common between husband and wife, and brothers and sisters. They are revocable by either party, as to his property, unless, perhaps, the benefit to the survivor be inseparable from the other provisions, in which case they are irrevocable, if the survivor accept the benefit. But if they be in effect double wills, and the provisions are not inseparable, acceptance of the benefit will not prevent the survivor from revoking the disposition of his property.[70] Mutual wills may consist of two separate and disconnected instruments; and, even when consisting of but a single instrument, may be made to operate upon the death of the testator who may die first.[71]

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[67] 2 Dall. (Pa.) 266 (1796); 72 Tex. 281 (1888).

[68] 39 Ohio St. 639 (1884).

[69] 92 (Ky.) 76 (1891).

[70] 136 Pa. 628 (1890).

[71] 26 Conn. 452 (1857); 50 N. Y. 88 (1872).

In Pennsylvania, where husband and wife had executed wills in favor of each other, and by mistake each signed the other's will, the husband dying first, it was held that the legislature could not pass a law reforming his will, because the rights of his heirs became vested on his death as an intestate.[72]

CONTRACT TO MAKE A WILL

41. A person may, for a sufficient consideration, bind himself to make a will in favor of another, to the extent of either the whole or a part of his estate; and, if he neglect to do so, the contract will be specifically enforced after his death. But if it concern realty, the contract must be in writing, or there must be a sufficient part performance to take it out of the statute of frauds.[73]

LOST WILLS

42. When a will, once known to exist, and to have been in the custody of the testator, cannot be found after his decease, the legal presumption is that it was destroyed by him with the intention of revoking it.[74] But this presumption may be rebutted; and, if it can be proved to the satisfaction of the court that the will once existed, and was duly executed, but was destroyed or suppressed by fraud, accident, or mistake, or by the act of the testator when insane or otherwise of unsound mind, or by act of God, or inevitable accident, such as flood, fire, or tempest, its contents may be proved, as in case of any other lost instrument, and the will thus established may be admitted to probate.[75] Some courts require proof of the whole will; others admit to probate whatever can be proved, though it be not all, and if the actual contents cannot be proved, proof of its substance is sufficient.[76] The burden of proving a lost will rests on the party who seeks to establish it, or claims under it.[77]

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72 67 Pa. 341 (1871).
73 90 Va. 728 (1894).
74 47 Ohio St. 323 (1890).
75 62 Ind. 61 (1878); 40 Conn. 587 (1873) 5 B. Mon. (Ky.) 58 (1844).
76 7 Dana (Ky.) 95 (1838).
77 120 Mass. 277 (1876).

THE LAW OF CONTRACTS

(PART 1)

INTRODUCTION

DEFINITION

1. A **contract** is "an agreement, upon sufficient consideration, to do or not to do a particular thing."[1]

This popular definition by Blackstone, while adopted by many authorities as good enough for practical purposes, has been criticized by others as not sufficiently comprehensive. Text-writers on this subject invariably explain and amplify the definition by careful and precise statements of the essential elements of a contract, thus supplying any meagerness in the epigrammatic definition of the great commentator.

A contract, specifically, is an agreement enforceable at law between competent parties, which creates an obligation between them, whereby each reciprocally acquires a right to whatever is promised by the other.[2]

In the formation of a complete contract it is essential that there be: (1) competent parties; (2) a lawful subject-matter, which includes a sufficient consideration (*quid pro quo*); and (3) mutual assent.

2. A contract that is exact "is a *promise*, or set of promises, which the law will enforce";[3] thus, the binding engagement is signified. An **obligation** is practically equivalent to legal liability, or legal duty. "To create an obligation is the one object which the parties have in view

[1] 2 Black. Comm. 442.
[2] 4 Wheat. (U. S.) 656 (1819), quoting Pow. Cont., p. 6.
[3] Poll. Cont. (6th Ed.), p. 1.

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when they enter into that form of agreement which is called a contract."[4]

By *obligation* is meant "the relation that exists between two persons of whom one has a private or peculiar right to control the other's actions by calling on him to do or forbear some particular thing."[5]

3. The agreement must be "an act in the law"; it must be concerned with duties and rights which can be dealt with by a court of justice.[6] **Agreement,** then, is "the expression by two or more persons of an intention to affect the legal relations of those persons."[7] There is an agreement when two or more minds are united in a thing done or to be done, or when mutual assent is given to do or not to do a particular thing, called in law *aggregatio mentium* (meeting of minds).

The result of the concurrence of *agreement* and *obligation* is a contract, concerning which it is well to remember all the essentials stated, and which are embraced in three propositions from six constructed by an oft-quoted authority, who adds, "that a voluntary promise, without any other consideration than mere good will, or natural affection, to give to another a sum of money . . . and that he will be a debtor for such sum, is no contract, but a mere *nudum pactum*,"[8] as it is called in law, meaning a naked promise—an undertaking or engagement without consideration.

HISTORY

4. Contracts are as old as civilization, and, in fact, one of the truest indications thereof. In the earliest periods of the world's history, engagement by contract was known and the student of classic pages finds illustrations at every turn. Ancient law, however, sanctioned the ceremony of ratification, rather than the engagement. No promise was binding if a trifling form were omitted; form and rites observed, no equitable defense could avail.

[4] Ans. Cont. (8th Ed.), p. 9.
[5] Poll. Cont., p. 4.
[6] Poll. Cont., p. 3.
[7] Ans. Cont. (8th Ed.), p. 3.
[8] 42 N. Y. 497 (1870), quoting Com. Cont., p. 2.

5. At the Roman law, the most important and latest surviving form of verbal contract was the **stipulation,** consisting in its ceremonial part of question and answer. The words were, "Such and such things do you promise?" and the reply was, "I do promise," and it was of this interrogation and assent that proof was required by law; informal agreements gave no right of action.[9] In the written contract, the formal act was the transfer of the sum due from the day book to the debit side of the ledger, a book account regarded by the Romans with peculiar respect. Upon the break up of the empire, Roman law was blended with barbarian custom in feudalism, but even in the earliest feudal communities the relation of lord and vassal was settled by express agreement at the time of investiture. In Anglo-Norman times, the equivalent of the stipulation was the deed, the most formal feature of which was the seal.

6. The origin of the English doctrine of *consideration*, and of the employment of that word as a technical term of law, is enveloped in obscurity, but as early as the sixteenth century the phrase *nudum pactum* (naked promise) had lost its Roman meaning of an informal engagement not actionable, and had come to be used in the sense it has since retained in English law, merely a promise void of reciprocal advantage to the promisor; where, as it was frequently expressed, there was no *quid pro quo*. The conception has continued to develop, until now the presence of a sufficient consideration is regarded as essential to the formation of a legal contract.[10]

So deeply rooted has this thought become, that the meaning of the sealing of a deed—the ceremony that anciently fixed its status as a formal contract—is obscured by the maxim that "a seal imports a consideration." History, therefore, shows a continuous modification and relaxation of the ceremonial rules of contract until the fundamental idea is reached of the "meeting minds." The ancient rule that a

[9] Maine Anc. L., p. 313.

[10] Dialog. Doct. & Stud. II, c. 24.

valid contract, with certain few exceptions, must satisfy exacting forms, has given place to the modern view that, with certain exceptions, no conventional formula is required to validate a contract. Custom has yielded, as it always must, to the pressure of commercial necessity and convenience.

CLASSIFICATION

7. Although the subject does not lend itself readily to complete analysis, various attempts have been made to classify contracts. The oldest known to the law was the division into *formal contracts* (deeds and recognizances) and *informal*, or *parol* (sometimes called simple), *contracts*. Owing to the growth of the subject, this analysis is no longer exhaustive; both classes are forms of *express contracts* and are herein so treated.

An **executed contract** is one where the property or benefits thereby secured have passed into the possession of, and have become vested in, the respective parties. Thus, if A sell goods to B for cash, and the goods be immediately delivered and the price paid, the contract is said to be executed, and the title of the parties to what they have received is absolute.[11]

An **executory contract** is one that conveys merely a right of action, as, if A agree to sell goods to B for a stipulated sum and deliver the same at a future date, each party acquires the right to sue the other if he fail to perform his part. When completely performed, the contract is executed.

An executed contract must be carefully distinguished from a contract with an executed consideration, where one of the parties has done all that he was bound to do, leaving a liability on the other side only.

8. A contract may be *express* or *implied*. An **express contract** is one where the parties making the same state

[11] 2 Black. Comm. 443; 2 P. & W. (Pa.) 67 (1830).

the terms thereof by their words, or in writing.[12] An **implied contract** is one that arises under circumstances, which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract.

Implied contracts are properly divisible into two classes: One, where a jury would have a right to *infer* from the acts and conduct of the parties that they intended to contract, and the other where the parties have not really entered into any proper contract at all, but where the *law prescribes* the rights and liabilities of persons who have entered into relations, which render it just that one should have a right and the other be subject to a liability. Obligations of the latter kind are sometimes spoken of as *quasi*, or *constructive*, contracts.[13]

ILLUSTRATIONS.—A writes to B, an innkeeper, offering to engage a room for a week at a certain price; B replies by letter, accepting A's offer. This is an *express* contract.

A, a traveler, puts up at B's inn, occupies a room, and is served with meals without agreeing upon the price. Here it will be inferred from A's conduct that he intended to pay for his entertainment. This is an *implied* contract.

A, a guest at B's inn, has valuable property stolen from him by B's servants through no fault of A's. Here the law has imposed upon B, as an innkeeper, the duty of keeping the property of his guests safe, and will compel B to make restitution to A for his loss. This is a *constructive*, or *quasi*, contract.

[12] 29 Pa. 465 (1857).

[13] 77 N. Y. 151 (1879).

NATURE

EXPRESS CONTRACTS

OFFER AND ACCEPTANCE

9. Every express contract has its inception in *offer* by one party followed by *acceptance* by the other. Upon communication of the acceptance, the contract is closed. The idea is expressed by the phrase, "It takes two to make a bargain." No formalities are essential; the communications passing between the parties may be by word of mouth, letter, telegram, even by conduct, provided there be a meeting of minds and an intention to contract.[14] This is true even though the form adopted be not wholly intelligible without explanation.

In one case a purchaser wrote a letter offering to purchase certain village lots; the agent for the property indorsed on the back of the letter the numbers of the lots and gave a copy of the same to the purchaser. It was proved that the agent made all his contracts in this form and always complied with them. The court held that there was evidence of a contract.[15]

10. It is important, however, not to construe as a contract mere negotiations and counter proposals intended by the parties as mere preliminaries to the agreement. Where a contract is epistolary, consisting of a series of letters, containing inquiries, propositions, and answers, it is necessary that some point should be attained at which the distinct proposition of the one party is unqualifiedly acceded to by the other, so that nothing further is wanting on either side, to manifest that *aggregatio mentium* which constitutes an agreement, and that junction of wills in the same identical terms offered on the one side and concurred in by the other, which brings the transaction to a conclusion.[16] A contract

[14] 1 Cush. (Mass.) 89 (1848).
[15] 5 Watts (Pa.) 525 (1836).
[16] 6 Pa. Sup. Ct. 411 (1898).

may be collected from a series of letters or documents containing alternate proposals and agreements, but the last communication must be a *distinct* and *unqualified consent* to an *equally clear proposal.*[17]

OFFER

11. An **offer** is a proposition to do anything;[18] as already stated, it is not binding until accepted. To make it effective, both parties must be bound; there must be promise for promise.[19]

While making an offer the party can dictate the *time*, the *place*, and the *terms of acceptance*, but he cannot impose upon another person the duty of rejecting his proposition in any particular form. Thus, where an uncle and nephew were negotiating for the purchase of a horse by the uncle, and there was a misunderstanding as to the price, and the uncle wrote offering to split the difference, adding, "If I hear no more about him, I consider the horse is mine at thirty pounds fifteen shillings"; to which no reply was sent; and the horse was afterwards sold to another party by mistake, it was held that there was no bargain to pass the property in the horse to the uncle.[20]

Where the offer is limited to a fixed and definite time, the acceptance must be made within that time. Thus, where one has "until a certain day" to accept, the acceptance may be made on that day.[21] Where no time for acceptance is prescribed by the offer, the acceptance must be within *reasonable time*, as after the lapse of such time it is no longer binding on the offerer.[22]

It is frequently of great importance to know when acceptance takes place and the contract commences, if the parties be at a distance from each other and be obliged to communicate by post or telegraph.

12. Acceptance.—The general rule is, that the **acceptance** is complete from the moment that the answer is

[17] 23 N. J. Eq. 512 (1872).
[18] Bouv. Law Dict., Vol. II, p. 538.
[19] 4 Wheat. (U. S.) 225 (1819).
[20] 11 C. B. N. S. (Eng.) 868 (1862).
[21] 18 N. J. Eq. 315 (1867); 1 W. N. Cas. (Pa.) 460 (1875).
[22] 98 Pa. 616 (1881).

despatched by the acceptor. And where an offer is made by letter and accepted by the posting of a letter of acceptance in due time before notice of withdrawal is received, the contract is not impaired by the fact that a revocation has been mailed before the letter of acceptance is received.[23] It is not even essential to the completion of the contract that the answer be actually received by the proposer.[24] While this seems a hardship, since the acceptor might at least take the risk of his acceptance going astray, yet, the courts have acted on the assumption that there must be a moment when the transaction is to be regarded as complete against both parties.[25]

13. There is no difference in the rules as to contracts by correspondence, whether the same be conducted by means of the post office or by telegraph.[26] The acceptance, however, must be mailed or delivered to the telegraph office in due time, the postage or telegraph charges prepaid, and the letter or despatch directed to the proper address of the offerer.[27]

Where an offer is made in one jurisdiction and the acceptance takes place in another, it has been held that the place of acceptance is the place where the contract is made, and, consequently, the law of the latter place will govern the contract.[28] Subject to what is laid down above as to contracts by correspondence, an offer to buy or sell, without more, is an offer in the present, to be accepted or refused when made. It may be withdrawn at any time, though that be at the next instant after it is made, and a subsequent acceptance will be of no avail.[29] So, too, the acceptance of an offer that has been previously declined and has not been renewed is not binding on the offerer. An offer is revoked by the death of the offerer before acceptance.

While, as stated above, it is the rule that an acceptance of a proposal by correspondence is complete upon the posting

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[23] 1 Barn. & Ald. (Eng.) 681 (1818); 9 How. (U. S.) 390 (1850); 149 U. S. 411 (1892); 2 Ch. Div. (Eng.) 463 (1876).

[24] 11 N. Y. 441 (1854).

[25] 4 Ex. D. (Eng.) 216 (1879); 6 Wend. (N. Y.) 103 (1830).

[26] 42 U. C. Q. B. 115 (1877).

[27] 42 Wis. 152 (1877); 38 Tex. 312 (1873); 11 Pac. Rep. 441 (1886).

[28] 15 R. I. 380 (1886).

[29] 165 Pa. 402 (1895); 39 Wis. 62 (1875).

of the letter of acceptance, it is not so as to the revocation of an offer, which is ineffective until received by the person to whom the offer is made,[30] the theory of the law being that a person who makes an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it is made that it is withdrawn.[31]

OPTIONS

14. An **option** is a contract by which one party for a consideration receives from the other party the privilege either of buying from that other party or selling to him at a specified price, within a fixed time, the article or thing which is the subject of their contract. In the language of the merchant's exchange, the option of *selling* is termed a **put**, and of *buying*, a **call.**[32]

There is a class of offers which is loosely described as options, having all the features of such a contract *except* the consideration. A true optional contract is one in which one party for a valuable consideration promises to do one of two or more things at his own election or the election of the other party. The word *option*, which means merely *choice*, is indiscriminately applied to a choice between accepting or rejecting an offer, and a choice between alternative obligations.

15. When in making an offer the proposer expressly promises and agrees to allow a given time to the other party to accept or reject his offer, if there be no consideration for this promise, the proposer may, nevertheless, revoke his offer at any time before acceptance by notifying the other party of the withdrawal of the offer.[33] This, as commonly expressed, "giving the refusal of a contract" for a specified time, is not properly an option, but merely an unaccepted offer. It states the terms and conditions upon which the offerer is willing to enter into a contract within the time limited.

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[30] 168 Mass. 200 (1897).
[31] (1892) L. R. 2 Ch. D. (Eng.) 27.
[32] Black's Law Dict.
[33] 159 Pa. 142 (1893); 56 Ill. 204 (1870); 171 Pa. 109 (1895).

If the holder of the option, or *refusal*, elect, he must give notice to the offerer, and the accepted offer thereupon becomes a contract. If the acceptance be not made within the time fixed, then the offerer is no longer bound and the option is at an end.

As a general rule, a *quotation of prices* by one merchant to another is not held to constitute either an offer to sell or an option to the person communicated with to purchase on the terms named in the quotation.[34] To create an obligation in such a transaction, there must be an order for the goods at the price quoted followed by an acceptance of the order by the original maker of the quotation.[35] The mere statement of the price at which articles are held for sale will not be construed as an offer to sell; it merely expresses a general willingness on the part of the dealer to enter into negotiations for a positive contract.[36]

Where the offer, however, does more than simply quote a price, by making in addition thereto a distinct proposal to supply a given article for a certain time, a contract may arise upon the acceptance of such a proposal.[37] The decisions upon this point are not clearly reconcilable, but, in the main, it may be said that if there be a fair and mutual engagement, sufficiently certain and definite in its terms to be intelligently acted upon by the parties, there is a contract.[38]

ILLUSTRATION.—A coal dealer proposed in writing to furnish defendant's steamers, which were making regular trips between certain ports, with coal at a price named for the year 1883. This proposition was accepted by the steamship owners, and coal was delivered until the summer of the year, when the owners sold the steamers and declined to receive coal thereafter. In an action to recover damages for the breach of the contract, the coal dealer was held entitled to recover.[39]

16. On the whole, it would seem that, in the cases where the courts have refused to enforce a general proposal and acceptance for the supply of an article, they have done so because of the uncertain and indefinite character of the agree-

[34] App. Cas. (Eng.) 552 (1893).
[35] 155 Pa. 530 (1893); 136 Mass. 511 (1884).
[36] 43 N. Y. 240 (1870).
[37] 155 Pa. 530 (1893).
[38] 174 Pa. 597 (1896).
[39] 130 N. Y. 642 (1891).

ment.[40] Where, however, there is a proposal to supply goods followed by a definite order fixing the quantity required and time of delivery, accepted by the proposer, the mutual obligation of the parties to perform the contract constitutes a consideration for the promise of each.[41]

If there be no consideration for the performance of a contract by one party, except the further performance by the other party with whom it is wholly optional whether he will perform or not, the contract lacks mutuality and is not enforceable.[42] The courts do not favor unilateral contracts.[43] But where the party holding the option has already given valuable consideration for the option, he may enforce the contract. In other words, if he have bought his option for value paid, he has bought a valuable right which he is entitled to enjoy.[44] Thus, where a man purchased of a firm a certain quantity of logs, then cut, at an agreed price, and also purchased another quantity of logs, to be cut, at another and smaller price, but reserved the right to refuse the latter if they did not arrive at a certain time, it was held that the price paid for the first logs, included a consideration for the right to exercise an option as to the latter part of the contract, and that the latter part of the contract was enforceable by the purchaser.[45]

On the same principle, where a lease gives an option to purchase, it is presumed that the absolute part of the contract contains a consideration for the giving of the option.

BIDS AT AUCTION

17. Bids at auction are mere offers which may be withdrawn at any time before the hammer is down, which act constitutes an acceptance by the auctioneer as the agent of the owner. The seller may withdraw his goods or the bidder may retract his bid at any time before they are struck

40 36 La. Ann. 35 (1884); 93 Mich. 491 (1892); 134 N. Y. 15 (1892).

41 43 N. Y. 240 (1870); 61 Fed. Rep. 893 (1894); 5 Hill (N. Y.) 256 (1843).

42 19 Minn. 535 (1873); see *subtitle* Mutuality *infra*.

43 28 N. J. Eq. 589 (1887).

44 60 Minn. 330 (1895); 3 Humph. (Tenn.) 19 (1842); 15 Ohio C. C. 660 (1898); 46 Pac. Rep. 426 (1896).

45 64 Minn. 27 (1896); 18 N. J. Eq. 124 (1866).

off, since the blow of the hammer signifies the final consent of both parties and the completion of the contract.[46] It has been held that a sheriff had no right to prescribe conditions at a sheriff's sale which deprived a bidder of his right to withdraw his bid.[47]

So, too, an advertisement by an auctioneer of the sale of goods at auction is not a warranty to those who may go to the sale on the strength of the advertisement that the goods will actually be sold.[48]

PUBLIC OFFERS BY ADVERTISEMENT

18. An offer may be addressed to the public at large in such a manner as to become the basis of a valid contract upon performance of the conditions of the offer by any person who sees fit to do so. Such a contract may arise by public advertisement in the newspapers, mailed circulars, handbills, or even by public oral statement of the offerer; and may be either an offer of a reward for the doing of a specified thing, or an agreement to pay a sum to the person acting upon the advertisement upon the happening of a certain contingency.[49]

As an illustration of the latter class, the noted "Smoke Ball" case may be cited.[50] There the proprietors of a medical preparation called "The Carbolic Smoke Ball" issued an advertisement in which they offered to pay one hundred pounds to any person who contracted the influenza after having used one of their smoke balls in a specified manner and for a specified period. The plaintiff on the faith of the advertisement bought one of the balls and used it in the manner and for the period specified, but, nevertheless, contracted influenza. It was held that these facts established a contract by the defendants to pay the plaintiff one hundred pounds in the event which had happened.

19. The *public offer of a reward* for any special service is a proposal which becomes a binding contract to pay the reward to the individual who acts on the offer and performs

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[46] 3 Wall. (U. S.) 196 (1865).
[47] 23 Pa. 308 (1854).
[48] L. R. 8 Q. B. (Eng.) 286 (1873).
[49] 52 Pa. 484 (1866); 151 Pa. 200 (1892).
[50] (1893) L. R. 1 Q. B. (Eng.) 256.

the service for which the reward is offered. The proposal need not be formally accepted by notifying the offerer.[51] The person who makes such an offer shows by his language and from the nature of the transaction that he does not expect notice of the acceptance apart from notice of the performance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it, and a person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common-sense reflection.[52]

An offer of reward may be limited by its terms to a special class of persons as "any bank officer," etc., but, generally speaking, the rule is that the individual who performs the service is entitled to the compensation.[53] In a case where, by law, a reward was given to any person who should pursue and capture a horse thief, it was held that the owner himself of the stolen horse, who had captured the thief, was entitled to the reward.[54]

The offer of a reward, however, must be seriously intended to constitute a proposal.[55] Thus, where after an affray in which his son was killed and he himself severely wounded, a man was heard to remark that he would give two hundred dollars to have the perpetrators of the assault arrested, the remark was not considered a public offer, but merely a strong expression of the man's feelings toward those who had injured him.[56]

20. An offer of reward may be revoked at any time before any one has acted in reliance upon it, and the same notoriety should be given to the revocation that was given to the offer. If the offer be published, the withdrawal should be published likewise.[57]

Like any other proposal, the offer of a reward lapses after the expiration of a reasonable time for acceptance. Such an offer is not indefinite; it is made to accomplish a particular

51 4 B. & Ad. (Eng.) 622 (1833).
52 (1893) L. R. 1 Q. B. (Eng.) 256.
53 24 Iowa 78 (1868).
54 107 Pa. 407 (1884).
55 6 Humph. (Tenn.) 113 (1845).
56 49 Ill. App. 459 (1893).
57 92 U. S. 73 (1875).

purpose and when that purpose is accomplished no formal rescission is needed to terminate its operation.[58] As to what a *reasonable* time may be, it is impossible to state a general rule. Each case must stand on its own circumstances. In one case, the expiration of seventeen years from the date of a resolution of councils of a city offering a reward was held too long a time to bind the city by acting on the resolution. In another similar case, the offer was held to lapse at the expiration of three years and eight months.[59]

GENERAL LETTERS OF CREDIT

21. The subject of *letters of credit* is treated elsewhere; simple allusion is made here to a discussion as to whether a general letter of credit constitutes a proposal. The view now generally adopted is that an open, or general, letter of credit (that is, a letter of credit not addressed to a particular person, but to all persons) is an open proposal of a contract addressed to any person who advances credit on the strength of it,[60] so that there springs up a privity of contract between the writer and the one who advances money on the faith of the letter, which will be the subject of a direct legal remedy upon failure of the writer to meet bills of exchange cashed on the faith of such letter.[61]

ADVERTISEMENTS FOR PROPOSALS

22. A *bid* in answer to an **advertisement for proposals** to erect a building or supply a specified article is but the first offer, and does not by any means follow that the advertiser is bound to award the contract.[62]

Proof of a custom of awarding the contract to the lowest bidder is inadmissible. The advertiser has a right to inquire into the fitness and ability of the respective bidders, and his discretion in accepting or rejecting a bid is absolute.[63] He may also attach terms to his acceptance, such as the

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[58] 156 Pa. 362 (1893).
[59] 7 Metc. (Mass.) 409 (1844).
[60] L. R. 2 Ch. (Eng.) 391 (1867).
[61] 2 Story (U. S.) 213 (1842); see *The Law of Commercial Paper:* Letters of Credit.
[62] 78 Me. 230 (1886).
[63] 155 Pa. 98 (1893); 28 L. & E. (Eng.) 470 (1854).

requirement that a bond shall be filed, or that a written agreement shall be executed, although the execution of a formal contract may be waived by an unqualified acceptance of the proposal.[64]

23. Where the terms upon which a contract for public work shall be awarded are fixed by statute or ordinance, the relations of the officials in charge of the work with the competing bidders are thereby fixed and the law must be complied with in the offer, acceptance, and execution of the contract.[65] A deliberative and discretionary power may, however, be given a public official in awarding contracts, especially if it is directed that the contract be awarded to the lowest "responsible" bidder, where the word *responsible* may be interpreted as applying not only to pecuniary ability, but also to judgment and skill on the part of the bidder.[66] A discussion of this subject belongs properly to municipal law, depending as it does on city charters, statutes, and their interpretation by the local courts.

ACCEPTANCE

24. No formality is required in law for an acceptance except that it must be *unconditional* and *identical in terms* with the offer thereof. What shall constitute an acceptance will depend in a large measure upon the circumstances of the case. As stated above, the offer may prescribe a certain form in which the acceptance shall be made, if it be to bind, but usually, anything that shall amount to a manifestation of a formed determination to accept, communicate, or put in the proper way to be communicated, to the party making the offer, will complete the contract.[67] Such assent may be in the form of a letter, telegram, by word of mouth, or may even be inferred from the acts of the parties.[68]

Mere silence does not, in law, give consent. A determination to accept must be in some way indicated to the

[64] 10 Wash. 339 (1894); 93 U. S. 242 (1876).
[65] 183 Pa. 300 (1897).
[66] 82 Pa. 343 (1876).
[67] 6 Wend. (N. Y.) 103 (1830).
[68] 62 Pa. 486 (1870).

proposer. For example, an insurance broker sent his clerk with the policy of insurance that was about to expire to the agent of the company, with an application to "bind it," that is, continue it temporarily in force. The clerk stated his request and left without receiving any answer. From such fact the court declined to draw a legal inference of contract. No answer had been given to the request, nothing was either done or said, there was nothing upon which the legal inference of an agreement could stand.[69]

A mere mental determination to accept an offer is equally ineffective to bind the parties.[70] An acceptance must be unconditional and explicit; in order to constitute a contract, there must be a proposal squarely assented to. If the proposal be assented to with a qualification, it must go back to the proposer for his adoption. An acceptance based on terms varying from those offered is a rejection of the offer. Thus, a proposition to purchase land followed by an acceptance on the condition that the seller reserve the timber for his own use will not constitute a contract.[71] So, an offer to sell two thousand tons of iron rails accepted by an order for twelve hundred tons will not bind the seller.[72] It is unnecessary to multiply examples of a rule that appeals so strongly to every business man's common sense.

25. The doctrine has occasionally been carried to an extreme, where matters that would seem to be mere details of the transaction, suggested rather than insisted on by the acceptor, have been held sufficient alterations of the terms to avoid the contract.[73] It is not always easy to say just where the line should be drawn. It is safe to say that where the notification of acceptance is coupled with an inquiry or reference to a merely ancillary or non-essential detail, the acceptance will not be treated as qualified. Such inquiries as "how shall we remit," or "how shall we charge," do not purport to qualify the acceptance.[74]

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[69] 119 Pa. 6 (1888).
[70] 46 N. Y. 467 (1871).
[71] 114 N. C. 252 (1894).
[72] 119 U. S. 149 (1896); L. R. (1894) 2 Ch. D. 332.
[73] 46 Mo. 363 (1870); 67 Iowa 678 (1885).
[74] 20 Barb. (N. Y.) 42 (1855).

An acceptance distinctly requiring, as a condition, the execution of a formal written agreement does not complete the contract.[75] Mere negotiations, having for their object the completion of a written contract, which are broken off before a mutual understanding is reached, will not bind the parties. Thus, where an organ builder and a purchaser had had a series of interviews relative to the construction of an organ for the defendant, throughout which the purchaser constantly demanded a written agreement and none of those submitted were satisfactory, the negotiations finally ending, it was held that no binding contract arose.[76]

ACCEPTANCE INFERRED FROM CONDUCT

26. Acceptance of a proposal may be *inferred* from the acts of the parties, as by compliance with the proposition.[77] Thus, where a father declared that whoever would take care of his sick son would be well paid, and this was communicated to one who continued to care for the son, the court held that acceptance of the father's offer might be inferred and gave judgment in his favor.[78] So, where a purchaser ordered staves, writing "if they are rift staves and good, I will give you thirty-five dollars a thousand delivered at the station," and the seller did deliver the staves as specified, the seller's acceptance was implied from his compliance with the buyer's directions.[79]

Where conduct is relied on as constituting an acceptance, such conduct must, just as in the case of words, be unambiguous and explicit.[80] So, also, it must be in accordance with the terms of the proposal. One who gives an order for goods to a certain party proposes to deal only with that party, and cannot be required to assume contractual relations with a third party to whom the order has been transferred without his knowledge or consent.[81]

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75 159 Pa. 295 (1893).
76 14 W. N. Cas. (Pa.) 318 (1884).
77 5 Pa. 339 (1847).
78 69 Pa. 311 (1871).
79 62 Pa. 486 (1870).
80 169 Pa. 213 (1895).
81 189 Pa. 189 (1899).

WITHDRAWAL OF ACCEPTANCE

27. The unconditional acceptance of a proposal, as stated above, completes the contract and neither party is entitled to withdraw. It must appear, however, that the minds of the parties have met. If any part of the contract be not settled or a method agreed upon for settling it, there is no contract.[82] This is particularly the case where the presentation of a satisfactory written contract for signature is a condition precedent to the agreement;[83] so, also, if the entire correspondence show that at one time an agreement was reached but that subsequently the whole matter was reopened by both parties proposing additional terms which are never ratified.

28. Whether a mailed letter of acceptance can be revoked by a subsequent telegram which is received by the offerer before the letter is delivered to him is disputed.[84] The cases in the United States are so clear that a contract is complete from the moment of the posting of the letter that it is difficult to see how they could be qualified by a rule permitting the withdrawal of an acceptance by a telegram anticipating its arrival.[85] In Scotland, however, it has been held that where a letter of acceptance and revocation were both delivered in the same mail the acceptance was countermanded.[86]

FORM OF CONTRACTS

29. At common law, contracts, as to form, were divided into two classes, (1) specialties, or *contracts under seal*, and (2) *parol*, or *simple*, *contracts*. A third class, *contracts of record* (that is, judgments, recognizances etc.), does not concern us at present.[87]

If a contract were not under seal or recorded, it made no difference, so far as the common law was concerned, whether it were in writing or merely oral. The value of a written

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[82] 18 Fed. Rep. 673 (1883).
[83] 159 Pa. 295 (1893).
[84] Bish. Cont., Sec. 328.
[85] 20 Fed. Rep. 96 (1884).
[86] 9 Sh. & Dunl. 190 (1830).
[87] 1 Story Cont., Sec. 2.

agreement not under seal was *merely evidential* and did not go to the status of the contract,[88] and this is true at the present day, although in many jurisdictions the distinction between sealed and unsealed instruments has been abolished. Except in a limited number of cases governed by the statute of frauds (which will be considered later), where a written and signed agreement is required, it is of no importance to simple contracts, so far as their validity is concerned, whether they be oral or written so long as they are supported by a sufficient consideration. Certainty and facility of proof are real and practical advantages gained by reducing a contract to writing, but the obligations of the parties are not thereby altered.

There is, consequently, no *inherent* legal superiority in a written contract over an oral one aside from the statutes and rules of law that have given a written memorandum a superior value as evidence.[89]

ORAL CONTRACTS

30. Just as speech in point of time preceded writing, so *oral contracts* preceded written ones. In fact, in the Anglo-Saxon period of our law, actual *delivery of possession* was probably the only known method of transfer of property between living persons.[90] Property itself was for all practical purposes synonymous with cattle, and there runs through the Anglo-Saxon laws a series of ordinances impressing on buyers of cattle the need of buying before good witnesses, not for the purpose of validating the sale, but to protect the purchaser from subsequent claimants who might allege that the cattle were stolen.

Civilization has advanced far since that period, and the necessities of commerce and business have introduced forms of agreement that cannot be oral; such, for example, as drafts, notes, and letters of credit. But, as already stated, aside from statutory exceptions and the law merchant, a contract in spoken words has the same legal effect as if written.[91]

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[88] 7 T. R. (Eng.) 350 (1797).
[89] 33 Mich. 144 (1876).
[90] Poll. & Maitl., Hist. Eng Law 57.
[91] 28 N. Y. 147 (1863).

ILLUSTRATION.—In an action in Massachusetts upon an agreement to insure, it was shown that the plaintiff's agent had made application to the company's agent for insurance on the plaintiff's property, and that in a conversation between the two agents the offer was accepted and the time, rate, and amount of insurance agreed to. No statute of Massachusetts then required a policy of insurance to be in writing. The court stated that it would not refuse to enforce the verbal agreement which the parties had made, when sufficiently proved by oral testimony.[92]

Prima facie, therefore, an *oral contract* is valid;[93] the exceptions are those *created by law* or the *rules of evidence*.

PARTLY ORAL AND PARTLY WRITTEN CONTRACTS

31. A contract which is not required by law to be in writing may be partly expressed in writing and partly in an unwritten agreement between the parties, and, if so, such unwritten agreement may be proved by oral evidence,[94] and if it appear from the evidence that the memorandum was incidental and subordinate to the principal contract, and its expression so indefinite that without oral testimony its meaning cannot be understood, the court will allow extrinsic evidence to be introduced to explain its terms and to supply all omissions.[95]

A contract partly in *writing* and partly in *parol*, for most, if not all, legal purposes, is treated as a parol (oral) contract.[96] There is no reason why the engagement of one party may not be in writing and that of the other rest in parol, even when the contract is wholly executory.[97]

AGREEMENTS CONTEMPLATING A FORMAL WRITTEN CONTRACT

32. A contract contemplating the execution of a written agreement, the terms of which are mutually understood and finally agreed upon, is in all respects valid and obligatory, where no statute interposes, as the written contract itself would be if executed. If, therefore, it appear that the

92 16 Gray (Mass.) 448 (1860).
93 26 N. J. Law 268, 281 (1857).
94 18 Kan. 546 (1877).
95 45 Tenn. 539 (1868).
96 96 Ind. 134 (1884).
97 55 Pa. 504 (1867).

minds of the parties had met, that a proposition for a contract had been made by one party and accepted by the other, that the terms were definitely understood and agreed upon, and that part of the mutual understanding was that a written contract embodying these terms should be drawn and executed by the respective parties, this is an obligatory contract which neither party is at liberty to refuse to perform.[98] A stipulation to reduce a valid agreement to some other form cannot be used for the purpose of evading the performance of those things to which the parties have mutually agreed upon by such means as made their assent binding in law.[99]

If two persons, therefore, enter into a verbal agreement about a matter as to which an enforceable verbal contract can be made, it is no defense to say that it was understood that it was to be reduced to writing.[100] The agreement to put in writing amounts to no more than an agreement to provide a particular kind of evidence of the terms of the contract,[101] and no more prevents its enforcement upon other legal evidence than an agreement to call in a named individual and state the terms of their contract to him would prevent any other competent witness from proving what the contract was.

The exception to this rule is where the parties expressly stipulate and agree as a condition precedent to the agreement that the terms of the contemplated contract are to be reduced into writing and that they are not to be bound until the agreement is so reduced and they have assented to the same in its final form.[102]

33. If the original understanding be that the terms are to be reduced into writing, and the parties are not to be bound until the terms are reduced into writing, then each party has a right to withdraw before the agreement is signed.[103]

In applying these principles, difficult questions of fact arise as to whether the parties have finally agreed to the

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98 144 N. Y. 209 (1894), quoting 21 N. Y. 308 (1860).
99 L. R. 8 Ch. D. (Eng.) 70 (1878).
100 162 U. S. 529 (1896).
101 10 Bush (Ky.) 632 (1874).
102 6 H. L. Cas. (Eng.) 238 (1857).
103 *Ibid.*, 305.

terms to be embodied in the formal document, or whether they have merely consented that such a document shall be prepared to which their consent must be given when the same is submitted for approval.[104] The question is one purely of *intention*, to be gathered from and depending absolutely on the facts and circumstances of each particular case as it arises.

Although it is agreed that a verbal contract shall be reduced to writing, yet, if the parties go on and act on the verbal contract, they cannot repudiate it; even if they might have refused to act until the agreement was put in writing, they waive that right by performance.[105] An agreement actually carried out does not cease to be a contract because the parties differ as to its terms when they attempt to state them in writing;[106] the real terms are open to proof. The formal contract contemplated by the parties in furtherance of a definite agreement is, in the words of a Massachusetts judge, "merely an additional wheel in the machinery."

MEMORANDA OF AGREEMENTS

34. A **memorandum** is a note or series of notes upon a transaction intended to assist the memory of one or more of the parties thereto. If the parties contemplate a contract, mere memoranda, which show that a contract was intended to be prepared, do not constitute a contract that can be subject of an action.[107] But where, during the course of negotiations, a memorandum of the terms of the proposed agreement is prepared, such memorandum, while not conclusive evidence of a contract, is, nevertheless, admissible in evidence and is entitled to some weight in ascertaining what the parties understood and what they did at the time of the negotiation.[108]

A memorandum of a parol contract, made and signed by one of the parties in his private memorandum book

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[104] 35 N. J. Eq. 266 (1882); 86 Me. 248 (1894).
[105] 27 Vt. 485 (1854).
[106] 39 Mich. 594 (1878).
[107] 3 Cent. Rep. 111 (1886).
[108] 90 Pa. 317 (1879).

for his own personal use, is conclusive upon no one.[109] It is at most a piece of evidence in favor of the party when accompanied by proper parol proof and only competent against the other party as an admission, the force of which is to be determined by proof of the circumstances under which it was made tending to show assent thereto.[110] At the same time, if it be the purpose of the parties to reduce to writing what they have already agreed upon as a definitive contract covering the results of their oral agreement, although it may be inartificially drawn and obscure, it is, nevertheless, a contract, if the circumstances surrounding its execution be consistent with such a conclusion.[111]

WRITTEN CONTRACTS

35. As previously stated, a *written contract* has no higher legal status so far as the *obligation* of the parties is concerned than an oral one, but its *evidential value* is greater and, by law, it is in many cases the only evidence admissible to prove the agreement. By the rules of evidence, also, a plain and unambiguous written contract deliberately entered into by the parties cannot be explained away by oral testimony.

"When parties have deliberately put their engagements into writing in such terms as import a legal obligation without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole of the engagement of the parties and the extent and manner of their undertaking was reduced to writing; and all oral testimony of a previous colloquium between the parties, or of conversation or declarations at the time when it was completed or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon to the prejudice, possibly, of one of the parties, is rejected."[112]

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109 40 Vt. 513 (1868).
110 3 Vt. 391 (1831); 20 Ind. 15 (1863).
111 30 Fed. Rep. 225 (1887).
112 Greenl. Ev., Sec. 275, cited in 80 Md. 579 (1895); 35 Fla. 544 (1895); 145 N. Y. 171 (1895).

A contract need not be in one piece of paper, nor executed at the same time by both parties. It is sufficient if a series of writings contain the whole contract, showing the parties, the terms, and the consideration;[113] this is always the case, as previously stated, in a contract proved by correspondence.

BLANKS IN CONTRACTS.

36. Blanks left in a written contract do not render it incomplete where they can be readily supplied from other parts of the instrument itself.[114] But where blanks are left as to the terms of the agreement, in a contract containing no stipulation that they shall thereafter be filled in accordance with any defined or definable rule or ascertainable facts, the instrument is incomplete and cannot be made the basis of an action.[115]

A written agreement executed by one who promised to pay another a sum, left blank in the contract, upon certain conditions, is of no force whatever.[116] The instrument must, also, show to whom the consideration is payable,[117] although a mere mistake in the name of a party to a contract apparent on its face, if there be sufficient data in the instrument to identify him with certainty, will not affect its validity.[118]

The question as to whether blanks left in a simple contract in writing may be filled after execution is one purely of agency; and, since an agent may be appointed to bind his principal either by parol or in writing, a duly qualified agent may fill the blanks in a written contract, and, where a simple contract is delivered with blanks unfilled, an implied authority is thereby conferred to fill the blanks in order to complete the instrument according to the terms of the agreement.[119] As between the parties, no such right can be implied, if it be contrary to their agreement or if the agent violate his instructions. But, where, through negligence, a person allows an incomplete instrument to go out of his hands, the

113 18 Ill. 483 (1857).
114 4 Pa. 166 (1846).
115 77 Ind. 447 (1881).
116 73 N. C. 365 (1875).
117 1 Ill. 200 (1826).
118 10 Mass. 360 (1813); 44 Ohio St. 171 (1886).
119 97 Pa. 420 (1881); 108 Pa. 104 (1884).

doctrine of estoppel may compel him to suffer the consequence rather than an innocent third party.[120]

As to whether blanks left in a sealed instrument can be filled after execution there is a noticeable conflict of authorities. If filled in the presence of the maker of the instrument before delivery, the instrument is as perfect as if the omission were supplied before execution.[121] But where an instrument is both sealed and delivered, the more conservative decisions hold that the authority to fill blanks must also be given in writing under seal. Such is the prevailing doctrine in England,[122] and it is followed in many of the United States;[123] but there are other decisions in the United States that certainly tend to qualify or deny the doctrine in favor of permitting the completion of an imperfect sealed instrument by parol authority, where the blanks are filled by the party authorized to supply the omissions before delivery.[124] Here, too, the doctrine of estoppel is applied in favor of an innocent third party.[125] The cases are so conflicting as to be practically irreconcilable, and require, for safety, a reference to the last decision of each respective state.[126]

ALTERATION OF WRITTEN AGREEMENTS

37. Alterations, erasures, interlineations, or other changes in the draft of a written agreement, before final execution and delivery of the same, do not in the least affect its validity as a contract.[127] Ordinary prudence has established the practice of noting such changes, whenever material, in the attestation clause; but the mere fact that an alteration appears in an instrument does not raise any presumption either for or against its validity. The question when and for what purpose the alteration was made is purely one of

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120 67 Pa. 82 (1870).

121 110 U. S. 119 (1883); 6 Allen (Mass.) 305 (1863).

122 6 M. & W. (Eng.) 200 (1840); 11 M. & W. (Eng.) 793 (1843); L. R. 3 Q. B. (Eng.) 573 (1868).

123 50 Cal. 613 (1875); 2 Wall. (U. S.) 24 (1864).

124 47 Iowa 188 (1877); 24 N. Y. 330 (1862).

125 137 N. Y. 183 (1893).

126 Am. & Eng. Encyc. Law (2d Ed.), Vol. 2, p. 249, etc.; 53 Me. 89 (1865).

127 5 M. & S. (Eng.) 223 (1816); 154 Ill. 268 (1894).

fact, and he who relies on the instrument is entitled to prove that the alterations were honestly made before execution. In this respect, it is purely a question of evidence.[128]

38. Where a written contract in the process of execution requires the signature of a number of parties and, in the progress of the transaction, it is altered as to some who have not yet signed it, without the knowledge of the first signers, but not in part affecting their liability, and it is then signed by the others, the contract is good as to the first signers according to the terms agreed upon by them, and is good as to the subsequent signers with the additional obligation.[129]

39. Where a written contract is altered in a material part after execution by or with the consent of one of the parties and without the consent of the other party or parties, the instrument is totally invalid in the hands of the party responsible for the change as against the other party or parties not consenting thereto.[130] The rule applies equally to specialties and simple contracts.[131] A **material alteration** is one that changes the legal effect of the contract, causing it to speak a language differing from that contemplated by the parties in entering into the agreement.[132]

40. In the United States, the mere destructive act of a stranger is simply a spoliation and in no wise affects the validity of the instrument.[133] The English rule is that the alteration of an instrument by a stranger avoids it,[134] the strictness of which can only be explained on the principle that a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part.

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128 20 Vt. 205 (1848).
129 50 Fed. Rep. 764 (1892).
130 63 Pa. 327 (1869); 12 Cush. (Mass.) 61 (1853); 2 R. I. 345 (1852).
131 See *The Law of Commercial Paper*.
132 92 U. S. 330 (1875).
133 2 Mas. (U. S.) 478 (1822); 35 Vt. 521 (1863); 63 Pa. 327 (1869).
134 13 M. & W. (Eng.) 343 (1844).

PRINTED CONTRACTS

41. The definition of the word *writing* includes *printing*.[135] It means no more than conveying our ideas to others by characters or letters visible to the eye. It is not essential that it be in ink; it may be in lead pencil.[136] A **printed contract** is universally treated as a written contract. And so where a contract is prepared by using a printed blank and filling the blanks by hand, the printed part of the contract is as strictly binding as the so-called *written parts*.[137]

Where, however, there are inconsistencies between the *printed form* and the *written parts* of a contract, it is the duty of the court, if possible, so to construe the contract as to give effect to every expression contained therein. But this rule is not applicable to a case where the repugnancy between the various provisions is irreconcilable.[138] If such a repugnancy exist, then the printed portions of the contract must be subordinated to those that are written, since the latter are presumed from the circumstances of their special and deliberate insertion by the parties to embrace their real intent and meaning, whereas, the words of the printed form are of more general character, originally chosen for application to similar subjects only, and frequently are, by alterations and changes, adapted to express as near as may be the intention of the parties.[139] Thus, where, by the terms of the correspondence clearly expressed, the contract of the parties was a bailment and not a sale, the words used in the printed billhead of the invoice which indicated a sale did not, in the opinion of the court, in any way control, modify, or alter the terms of the contract.[140]

42. Printed Regulations, Tickets, Etc.—There is a class of contracts which are evidenced by printed regulations, conditions, etc., construed as part of the offer of the promisor, and expressly or impliedly accepted by the person who enters into the contract. If the form be accepted

135 4 Vt. 535 (1832).
136 84 Pa. 510 (1877).
137 40 Ill. 527 (1866).
138 97 N. Y. 333 (1884).
139 129 Pa. 94 (1889).
140 150 U. S. 312 (1893).

without objection by the promisee, then he will be bound by its terms, and it will not do for him afterwards to allege want of knowledge of the contract. Thus, a mill owner may adopt certain regulations for the persons entering his employment, and, if they be read and the terms be understood and accepted without further inquiry as to their effect, they are binding.[141]

The rule is subject to certain well-recognized exceptions. That the minds of the parties must have met is essential to all contracts, and if the party accepting such a printed form may reasonably be supposed to have been misled as to its terms, or to have believed that it imposed no terms at all, owing to the manner in which the form is printed, posted, or issued, it cannot be said that the minds of the parties have met. Thus, a railway ticket, as ordinarily understood, is a receipt for the passenger's fare, but it may be, and frequently is, issued subject to conditions printed thereon, which enter into the contract for transportation.[142]

A transportation company, in making its contract, may limit its liability (generally not for negligence), and such limitations may be printed on its ticket or receipt; but there must be an assent thereto by the other party,[143] and such assent will not be implied where the notice is obscurely or unintelligently worded, or where the circumstances attending the delivery of the same repel the idea that the acceptor had knowledge of, or, in fact, assented to the contract printed thereon.[144]

SEALED CONTRACTS

43. As previously stated, the **sealed contract** is the formal contract of the English common law. In technical language, it is the "act and deed" of the parties, not strictly the contract itself, but the formal evidence of it. In its

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141 2 Cush. (Mass.) 80 (1848).
142 79 Va. 130 (1884); 71 Pa. 432 (1872).
143 23 Fed. Rep. 765 (1884) and note; 100 Mass. 505 (1868).
144 93 U. S. 174 (1876); L. R. App. Cas. (Eng.) 217 (1894); 5 C. P. Div. (Eng.) 1 (1879); 2 C. P. Div. (Eng.) 416 (1877); see *The Law of Carriers.*

general sense, a *deed* is a *writing sealed* and *delivered* by the parties.[145] The common law further required that it be written on paper or parchment, probably to prevent the sealing as formal contracts of the wooden tallies used in ancient times.[146] All contracts, therefore, which are sealed and delivered are **deeds,** but at the present day the word *deed* is generally applied in a more restricted sense to instruments of conveyance of real property. The rules, however, concerning the execution and delivery of all sealed instruments are practically the same.[147]

While an instrument under seal is still regarded as the most solemn and authentic contract known to the law, the tendency in modern times is toward abating its superior dignity. In some of the states, private seals have been abolished, and, in others, the distinction between sealed and unsealed instruments has ceased to exist. Many of these statutes expressly retain official seals and the seals of the corporations.[148]

MERGER OF SIMPLE CONTRACT IN SPECIALTY

44. Since an instrument under seal is regarded as of a higher nature than a simple contract, it has been ruled that if the parties to a simple contract enter into one on the same subject-matter under seal, the first becomes merged in the second.[149] "Extinguishment by merger takes place between debts of different degrees, the lower being lost in the higher; and being by act of law, it is dependent on no particular intention."[150] It is not the case of satisfaction of a debt by taking or substituting a different security for the same; that is a different subject altogether. Merger of the simple contract in the specialty means that the creditor gains a higher security for his debt, but the debt is the same although the old evidence of it melts into the new.[151] Hence, for a

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145 Co. Litt. 35 *b*; 4 Kent's Comm. 450.
146 Poll. Cont., p. 129.
147 See *The Law of Property:* Deeds.
148 Cal. Code, Sec. 1,629; Ark. Const. (1874); Ind. R. S., Sec. 214; Iowa R. S., Sec. 3,068; Ky. R. S., Sec. 471; Wash. R. S., Sec. 4,523; Mont. R. S., Sec. 2,191; Mo. R. S., Sec. 893; Dak. Code, Sec. 3,246; Miss. Code, Sec. 993; Ohio R. S., Sec. 2,154.
149 10 C. B. (Eng.) 561 (1851).
150 3 W. & S. (Pa.) 276 (1842).
151 92 Ind. 328 (1883).

specialty to have this effect, it must be between the same parties and coextensive with the simple contract.[152]

Thus, an agreement under seal, acknowledging an indebtedness in a sum certain and transferring certain property as collateral security for the payment of same, was held not a merger of the original simple contract debt.[153]

ESTOPPEL

45. It is, also, a principle of the common law that a party to a specialty is *estopped* from disputing his own solemn act and deed.[154] That is to say, where the parties have sealed their contract, a status of authenticity is attached both to the direct agreements and the effective recitals therein, which binds the parties in all controversies relating to this contract, whether the same relate to real estate or personal property.[155]

While the principle of estoppel is of importance as strengthening the rule of evidence, that nothing outside of a written contract shall be permitted to contradict or avoid the contract, its application relates largely to the subject of deeds and their recitals.[156]

A SEAL AS IMPORTING CONSIDERATION

46. The special characteristic of a contract under seal at the common law was that no consideration was needed to support it. The sealed instrument, as the formal contract of the law and the solemn act of the parties, was deemed binding, although there was no consideration given for its promises. The seal, it was said, *imported* a consideration.[157]

ILLUSTRATION.—A man entered into a contract under seal, agreeing to be responsible for the rent of a store, and the tenant abandoned the premises and the landlord sued the surety on his contract. Although the evidence showed that the contract was executed without the parties contemplating the passing of any valuable consideration to the surety he was, nevertheless, held bound by his contract voluntarily made, and it was not necessary for the landlord to prove any consideration in order to recover.[158]

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152 19 C. B. N. S. (Eng.) 76 (1865), and note to Am. Ed.

153 1 S. & R. (Pa.) 294 (1815).

154 7 Pa. 378 (1847).

155 Bish. Cont., Sec. 274.

156 See *The Law of Property:* Estoppel.

157 11 S. & R. (Pa.) 107 (1824); 25 Pa. 203 (1855).

158 171 Pa. 632 (1895).

The rule, however, that a seal imports a consideration is not of universal application. As already stated, in a number of states, the distinction between sealed and unsealed instruments is now abolished, and, in other jurisdictions, the seal merely affords a presumption of a consideration capable of being rebutted by proof that the parties intended a consideration. But the adoption of such a rule of evidence does not abrogate all voluntary and gratuitous contracts under seal, nor vitiate a voluntary agreement under seal where there was no consideration and none intended by the parties.[159]

An exception to the rule is now well established, that where a valuable consideration was intended to pass and, therefore, furnished the motive for entering into the contract, and such consideration has failed, the failure of consideration may be shown in defense.[160]

It is also a rule of the courts of equity that they will not interfere with their special remedies, such, for example, as to decree the specific performance of a contract where there was in fact no consideration.

The fact, also, that a contract is under seal will not validate it if it be executed in consideration for, or be an undertaking to do, any immoral or illegal act,[161] or if it were obtained by fraud; for otherwise "a bond would be made a cover for every species of wickedness and illegality." The court may inquire into the true consideration of a contract whether sealed or unsealed.[162]

AUTHENTICATION

47. As before explained, there is but one formal contract known to the common law—the deed or contract under seal. All others are simple contracts depending for their validity on the presence of a consideration, and free from the requirement of any technical words or form. The statute of frauds

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159 40 N. J. Law 446 (1878).

160 8 S. & R. (Pa.) 178 (1822); 9 How. (U. S.) 213 (1850).

161 14 How. (U. S.) 38 (1852).

162 See *subtitle* Consideration *infra.*

has, however, imposed upon certain simple contracts the requirement of a memorandum in writing, a subject which will be considered later.[163]

Where a contract is oral, its proof is purely a question of evidence; formalities are necessarily excluded. Where the contract is in writing, the law has established or accepted certain formalities in the interest of justice. These rules are neither strict nor technical, and have sprung from the necessity in civilized communities of uniform rules of conduct, the need of a common understanding as to the significance of one's acts in dealings between man and man.

SIGNING

48. The common and ordinary method of signifying one's assent to a written contract is to *sign* it. The **signature,** properly, is the name of the party duly attached to the writing.[164] As, however, names are merely to distinguish one person from another, the question of the sufficiency of a signature is largely a question of sufficient identification,[165] and this may be accomplished although the full name or even the true name of the party be not used.[166] An extreme case in this line was decided where a party placed the figures 1, 2, 8, upon the back of a bill of exchange, meaning thereby to bind himself as an indorser. This was held a sufficient indorsement.[167] So, also, it has been held that the Christian name of a party alone would suffice, there being no doubt as to the identity. The initials only, especially where the surname is written in full, will be enough to bind the signer.[168]

"No person is bound to accept his patronymic as a surname, nor his Christian name as a given name, though the custom to do so is always universal authority among English-speaking people who have inherited the common law. A person may be known by any name in which he may

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163 See *subtitle* Statute of Frauds *infra.*
164 1 Bish. Cont.
165 68 Me. 427 (1878).
166 71 Ind. 136 (1880).
167 6 Hill (N. Y.) 443 (1844)
168 81 Ind. 500 (1882).

contract, and in such name he may sue and be sued, and by such name he may be criminally punished."[169]

49. *Signing* does not necessarily mean a *written signature*, as distinguished from a signature by mark, by print, by stamp, or by the hand of another. A contract or deed signed with the promisor's name in his presence and by his request, although by a stranger, is sufficiently well executed.[170] The signing in such case is deemed the grantor's act, unless a particular statute require a signature in the proper handwriting of the party.[171]

A party may authorize another to sign his name for him,[172] and if a party, knowing all the circumstances, and intending to be bound by it, acknowledge the signature to an instrument to be his own, he is bound by it whether it were originally signed by his authority or not.[173] But it is the safer and better practice for one executing a contract to write his correct name with his own hand if he be able to do so.

50. No one should sign a contract without reading it and understanding it thoroughly. If the party be illiterate, or understand the language imperfectly, he has a right to insist that the instrument shall be read over to him. If, however, he sign it without asking to have it read or explained to him, he is bound by it in the absence of fraud.[174] Thus, it may always be shown that the party was not capable of reading or understanding the instrument and that its terms were fraudulently misrepresented to him before signing.[175] But, in the absence of fraud or imposition, it is presumed that the terms of a written contract were known and assented to by the parties who signed it; that they either read it, or were informed of its contents, or were willing to assent to its terms without reading it.[176] This presumption is not defeated by showing that the contract signed was

169 68 Ind. 232 (1879).
170 157 Mass. 439 (1892); 5 Cush. (Mass.) 483 (1850).
171 L. R. 3 App. Cas. (Eng.) 582 (1878).
172 16 Minn. 204 (1870).
173 121 Mass. 157 (1876); 5 Dist. Rep. (Pa.) 335 (1896).
174 103 Pa. 594 (1883); 65 Me. 59 (1875).
175 22 Mich. 479 (1871); 130 Mass. 259 (1881).
176 102 Pa. 17 (1882).

different in terms from that which one or the other supposed he was signing. It is not permitted to show that another contract was the real contract, for the parties have chosen to put their agreement in writing to preserve its terms, and if they fail to read it, they are guilty of inexcusable negligence.[177]

51. Signature by Less Than All the Parties.—If by express stipulation, either by parol or contained in the writing itself, the contracts were not to be deemed complete until executed by others of the parties, the instrument will not bind those who have signed until completed by the addition of such signatures;[178] but, in the absence of such express stipulation, those who do execute the instrument will be bound, although the instrument as prepared appear to call for other signatures.[179]

Most of the cases belonging to the first class arise where the parties executing the instrument would have a remedy by way of indemnity or contribution against the other parties named which is lost by their failure to join; and if these reasons do not apply, a party who signs and delivers an instrument may be held bound by the obligation he assumes. If he intend not to be bound alone, he must accompany the delivery with an expression of such intention.[180]

Where a contract is signed by only one of the contracting parties but is accepted by the other party, who on the faith thereof performs the affirmative acts which constitute the consideration, it is mutual and binding on both.[181] The failure to sign is cured by acceptance.[182]

52. Position of Signature.—The customary position of the signature to a contract is at the end of the writing which it attests. But in order to bind a party it is not legally necessary that his signature should appear at the end.[183] If

177 84 N. Y. 354 (1881).
178 21 Me. 86 (1842); 4 Watts (Pa.) 21 (1835).
179 134 Pa. 191 (1890); 192 Pa. 279 (1899); 112 Mass. 463 (1873).
180 43 N. Y. 231 (1870).
181 33 Me. 359 (1851).
182 55 Pa. 504 (1867); 103 Ind. 520 (1885); 39 Minn. 456 (1888).
183 18 Tex. 275 (1857); 2 M. & W. (Eng.) 653 (1837).

he write his name in any part of the instrument, it may be taken as his signature, provided it were written for the purpose of giving authenticity to the contract and thus operating as a signature.[184]

But the *prima facie* presumption, that a party is bound by his signature to an instrument, does not exist where its position is *equivocal*, as in the case where it might be explained as that of a subscribing witness merely to a paper already executed.

53. Signing by a Person Not Named in Contract. There is some conflict of decisions as to whether the signature of a person not named in the contract binds him as a party. It would seem upon reason and principle that where a third person merely annexes his name to a contract which in the body of it does not mention him, and which is in itself a complete contract between other parties who sign it and are mentioned in it, such third person does not thereby become a party to the efficient and operative parts of the contract. His signature in such case can only be regarded as an expression of his assent to the act of the parties in making the contract, and may perhaps operate as an estoppel against his assertion in the future of an adverse interest in the subject-matter of the agreement.[185] The courts, however, have, in many instances, held parties liable who have subscribed their names to contracts but are not elsewhere mentioned, particularly in the case of sureties.[186]

Where the instrument purports to be between two persons and contains mutual and dependent stipulations, to be by them severally performed, and is signed by a third person in such manner as not to indicate in what capacity he is a party, no action can be maintained against him and one of the others jointly; but it has been held that although the name of a party be omitted in the body of the contract, yet, if he signed it and made part of the advances under it, he is a party.[187]

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184 2 B. & P. (Eng.) 238 (1800).
185 71 Hun (N. Y.) 536 (1893).
186 125 Mass. 50 (1878).
187 2 Denio. (N. Y.) 135 (1846); 38 Me. 379 (1854); 7 Me. 171 (1830).

SEALING

54. At common law, a seal was an impression upon wax or wafer or some other tenacious substance capable of being impressed.[188] "The days of actual sealing of legal documents, in its original sense of the impression of an individual mark or device upon wax or wafer or even on the parchment or paper itself, have long gone by. In short, sealing has become constructive rather than actual."[189]

The universal tendency, either by statutes or by decisions of the courts, is to do away with the formal act. Accordingly, it was held in the case just quoted that where a person writes his name in a printed form to the left of the printed word *seal*, so as to bring the latter into the usual and proper place for a seal, he adopts the act of the printer in putting the word there for seal. The decisions establish beyond question that any flourish or mark, however irregular or inconsiderable, will be a good seal, if so intended, and with stronger reason the same result must be produced in writing, the word *seal* or the letters *L. S.*, meaning originally *locus sigilli* (place for the seal), but now having acquired the popular force of an arbitrary sign for a seal. Just as the sign & is held and used to mean *and* by thousands who do not recognize it as the middle-ages' manuscript for the latin *et*.

55. In most of the states, the common-law practice has been modified by the allowance of a scroll or other device as a seal. These statutory provisions are far from uniform, and frequently contain special exceptions, such as in the case of official or corporate seals. The supreme court of the United States has held that it is enough, in the absence of positive law prescribing otherwise, that the impress of the seal is made upon the paper itself in such a manner as to be identified upon inspection.[190]

There must, however, be some sort of a seal or intent to seal to make an instrument a specialty.[191] There has been some discussion as to whether a specialty should contain a

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188 4 Kent's Comm. 452.
189 156 Pa. 329 (1893).
190 106 U. S. 348 (1882).
191 39 Miss. 737 (1861).

reference to the fact that it is sealed; but the prevailing rule is that such a recital is wholly unnecessary.[192] If an instrument be shown with a seal in fact, that is, with wax or wafer, the law pronounces it a deed whether anything be said in the instrument about a seal or not. Where, however, the writing has merely a scroll annexed, it has been held in some states that it is not a specialty, unless it appear from the terms of the instrument that the parties intended to give it that character.[193]

The general trend of the decisions is against this strict view, holding, practically, that whether an instrument be under seal or not is a question to be determined by the court on inspection, and whether or not any mark or impression shall be held to be a seal depends upon the intention of the party executing the instrument, as exhibited on the face of the paper itself.[194]

56. The customary manner of sealing an instrument at the present day is to write "witness my hand and seal," or words to that effect, in the attestation clause, and to affix after the maker's name the word *seal* surrounded by a scroll.[195] But in practice one must be guided by the local law. It is not necessary that the seal be actually affixed by the party executing the instrument; indeed, he may adopt as his seal one already affixed by another party. There need not, therefore, be as many seals as there are signers.[196]

Where an instrument purports to be a specialty, but there are in fact a smaller number of seals than signatures, it has been held that a presumption arises that each signer adopted a seal, capable of being rebutted by proof to the contrary.[197] The question as to whether the seal were adopted by the other signers or not is a question of fact to be determined by the jury upon the evidence.[198]

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192 28 Pa. 489 (1857); 35 Me. 260 (1853); 16 N. J. Law 324 (1838), citing 2 Coke 5 (1584).

193 4 Ala. 140 (1842); 15 Gratt. (Va.) 108 (1859); 16 N. J. Law 324 (1838); 58 Miss. 749 (1881).

194 121 Pa. 192 (1888); 21 Pick. (Mass.) 417 (1839); 5 Saw. (U. S.) 510 (1879); 57 Minn. 499 (1894).

195 16 N. J. Law 324 (1838); 40 W. Va. 339 (1895); 81 Ga. 453 (1889).

196 54 Mo. 426 (1873); 7 N. H. 230 (1834).

197 4 Wis. 96 (1855); 4 T. R. (Eng.) 313 (1791).

198 6 Pa 302 (1847); 150 Pa. 346 (1892).

ATTESTATION

57. In the absence of some express statutory provision, it is not essential to the validity of a contract under seal that it should be executed in the presence of a witness; this applies with stronger reason to simple contracts.[199] However, as a means of preserving evidence of the execution, it is the practice to require the signature of witnesses. In the United States, by statutory regulations, subscribing witnesses are required to *deeds*,[200] the number and formalities varying according to the law of each state. In most jurisdictions, this is a necessary prerequisite to recording.[201]

Sealing and *delivering* are the two prime requisites of a specialty, the execution of which may be proved in the absence of statute by proving the handwriting of the party.[202]

Attestation is the act of witnessing an instrument in writing at the request of the party making the same, and subscribing it as a witness.[203] It is not necessary that the witness should actually have seen the party sign nor have been present at the very moment of signing. If he be called in immediately afterwards, and the party acknowledge the signature to the witness and request him to attest it, this will be a sufficient attestation.[204]

58. An **acknowledgment,** in conveyancing, is the act by which a party who has executed an instrument goes before a competent officer or court and declares the same to be his genuine and voluntary act and deed, whereupon the officer attaches to the instrument his certificate under his hand and seal of office, if required by law to use an official seal, that the instrument has been acknowledged.[205] The practice of acknowledgment is purely the creation of statutes to prevent fraud. The statutes generally require an acknowledgment as a prerequisite to the recording of an instrument.[206]

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[199] 2 Black. Comm. 307, and note to Lewis's Ed.

[200] 16 N. H. 239 (1844).

[201] 73 Wis. 238 (1888); see *The Law of Property:* Deeds.

[202] 1 S. & R. (Pa.) 72 (1814); 53 Mass. 157 (1846).

[203] Black's Law Dict.; 17 Pick. (Mass.) 373 (1835).

[204] 1 Greenl. Ev., Sec. 569.

[205] Black's Law Dict.

[206] 2 McLean (U. S.) 362 (1841); see *The Law of Property:* Deeds, *Appendix, Book of Forms.*

STAMPING

59. Statutes are frequently enacted requiring, for the purposes of revenue, and especially during war times, that instruments and other papers, comprised in certain classes of contracts, be *stamped*. In England, a stamp act in some form or other, is in force at all times. In the United States, the most recent statute which required stamps to be placed on instruments, etc., was enacted at the outbreak of the late war with Spain. By a supplement thereto, which took effect in July, 1901, the stamp duty was removed from most of the simple contract instruments.[207]

DELIVERY

60. The **delivery** of a written contract is that act by which a party directly or indirectly signifies his intention to transfer the instrument he has signed to the other party, with the intention that it shall operate as a contract.[208]

Delivery is a necessary element in the execution of every contract in writing.[209] It applies equally to simple contracts and specialties; the delivery must be absolute and not conditional. In its legal acceptation, delivery is something more than merely changing the manual custody or possession. That may or may not be a delivery, according to the intent of the parties.[210] It is a question of *intent* and *purpose;* it is the final act of the parties by which the party executing the instrument puts it into the possession of the other party who receives it, both parties intending thereby to make it operative and binding.

This intent and purpose is usually inferred from the act itself of changing the custody; but it may be explained or rebutted.[211] So, too, there may be a delivery without change of possession, where such an intent may be gathered from the conduct of the parties, particularly of the grantor, and from the surrounding circumstances. "A deed may be

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207 See *The Law of Commercial Paper:* Stamps on Instruments.

208 22 Ind. 36 (1864); 31 Minn. 99 (1885).

209 9 N. Y. St. Rep. 91 (1887).

210 34 Vt. 565 (1861).

211 3 Law Rep. Ann. 299 (1889).

delivered by doing something and saying nothing, or by saying something and doing nothing, or it may be by both; . . . but by one or both of these it must be made."[212]

61. To constitute a delivery of a deed, it must clearly appear that it was the intention of the grantor that the deed should pass the title at the time and that he should lose all control over it.[213] While it is the law that a delivery will be presumed, in the absence of direct evidence,[214] from the concurrent acts of the parties recognizing a change of title, parol evidence is always admissible to show either the delivery or non-delivery of the instrument.[215] The question where the evidence is conflicting is one of fact, to be left to the jury.[216] Where the instrument is obtained from the party by fraud or theft, there is no delivery which will entitle the wrong-doer to hold it; but the wrongful act may be ratified.

As the essence of delivery is the intention of the party to complete the contract, his act must be such as to show that it is intended to be irrevocable. If he merely place the paper in the hands of a third person as a convenient place of deposit, still intending to retain control over it himself, there is no delivery.[217] The instrument must pass out of the control of the promisor.[218] A deed may be delivered to the grantee to await his determination as to whether or not he will accept it, or to be examined and returned if found defective, or to await execution by other parties.[219] In every such case, when an absolute delivery was not intended, the grantee is a mere trustee of the instrument for the grantor.

If, however, the instrument be actually delivered, but be returned for the purpose of correcting certain minor informalities, the return does not affect the delivery.[220] Where a contract is signed but is left with the scrivener for the purpose of making a duplicate, it may be a nice question as to whether or not there was a delivery.

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212 14 Ore. 82 (1886), quoting Shep. Touch. 57; 12 Johns. (N. Y.) 418 (1815).
213 158 Ill. 567 (1895).
214 94 U. S. 405 (1876).
215 18 S. W. Rep. 555 (1891); 107 Mass. 532 (1871).
216 143 Mass. 516 (1887).
217 8 Metc. (Mass.) 436 (1844).
218 159 Ill. 654 (1896).
219 28 N. Y. 333 (1863).
220 25 N. J. Eq. 404 (1874).

ILLUSTRATION.—In a Massachusetts case, where a building contract was signed in the scrivener's office and left with him for the purpose of having a duplicate made and sent to one of the parties, the court held that there was sufficient evidence to warrant the jury in finding a delivery of the agreement.[221] In another case (in Colorado), where an agreement was to be executed in duplicate, and one copy was signed and left with an attorney to have the other prepared, the court held that there was no delivery and no contract.[222]

62. Delivery need not be made to the grantee in person; if delivered *absolutely* and beyond recall, it is equally good whether delivered to the grantee, his duly authorized agent, or to a third person for the grantee's benefit. The test is whether the grantor divests himself of the estate; if so, the delivery is good. If, however, the instrument be delivered subject to future control of the grantor, no estate passes. If the delivery be absolute, it may be made to a third party to be held until after the grantor's death and yet be valid.[223]

If the promisor execute a specialty, and he, in person, leave it for record at the recording office, it is frequently said it is to be presumed that he intended to make delivery; but such presumption may be rebutted by evidence showing the promisor's real intention.[224] The authorities are not harmonious upon this question, some requiring further evidence of delivery, or at least of the assent of the promisee.[225]

63. Acceptance of Delivery.—Delivery implies both *tender* and *acceptance*. Acceptance on the part of the promisee is essential to complete the delivery,[226] and, in the case of refusal to accept a deed, the title of the grantor does not pass. Acceptance may be express and, also, like the tender, implied from the acts of the parties, any acts showing an intention to accept being sufficient. In fact, it is generally held that where a grant is plainly and clearly beneficial to the grantee, his acceptance of it is to be presumed in the absence of proof to the contrary.[227] This is true

221 102 Mass. 343 (1869).
222 5 Col. App. 203 (1894).
223 45 Fed. Rep. 828 (1891).
224 3 Wall. (U. S.) 636 (1865); 5 Wall. (U. S.) 81 (1866); 34 Pa. 252 (1859).
225 3 Metc. (Mass.) 275 (1841); 167 Ill. 631 (1897).
226 176 Pa. 550 (1896); 14 C. B. N. S. (Eng.) 473 (1863), and note.
227 3 Ohio St. 317 (1854).

whether the third person, to whom the deed is delivered for the use of the party in whose favor it is executed, be or be not the agent of the party benefited, provided the grantor part with all control over the instrument.[228]

64. Conditional Delivery — Escrow. — Where an instrument in writing is committed to the custody of a stranger to the transaction, with directions to deliver the same to a party upon the happening of a certain contingency or the performance of some obligation, it is called an **escrow.** Usually, an instrument delivered as an escrow is a deed of conveyance;[229] but, an escrow is not necessarily a deed; a promissory note, bond, or any simple contract in writing may be so delivered.[230]

In one respect, there is a distinction as to the effect of the delivery in escrow of a sealed and unsealed contract.[231] In the case of instruments under seal, it is generally held that one cannot deliver an escrow to the party in whose favor it runs.[232] It is an ancient rule, fully recognized by the modern authorities, that a deed cannot be delivered in escrow to the grantee. Where there is a valid delivery by the grantor to the grantee, it is impossible to annex a condition to such delivery, and the title vests in the grantee, although it may be contrary to the intention of the parties.[233] If the delivery be to one who is acting as the agent or attorney of the grantee, the effect is the same.[234]

65. On the other hand, the great majority of the cases make a distinction between instruments under seal and those not under seal, holding as to the latter that parol evidence is admissible to show that, notwithstanding the delivery to the party to be benefited, it was intended that the instrument should become operative as a contract only upon the happening of a future contingent event.[235]

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228 15 Wend. (N. Y.) 656 (1836); 42 N. J. Law 279 (1880).
229 See *The Law of Property:* Deeds, Delivery; 5 Conn. 555 (1825).
230 49 Mich. 56 (1882).
231 30 Minn. 313 (1883).
232 Co. Litt. 36 *a*.
233 45 Fed. Rep. 332 (1891).
234 84 Me. 340 (1892).
235 153 U. S. 228 (1893).

Parol evidence is, therefore, admissible to show that a written paper, which is in form a complete contract not under seal, of which there has been manual delivery, is, nevertheless, not to become binding until the performance of some condition precedent resting in parol.[236] Upon the performance of the condition or the happening of the contingency, the holder is bound to deliver the escrow to the grantee.[237] If it appear to have been the intention of the parties, the instrument, on the delivery of the holder, will be held to take effect as of the original date of its delivery, especially where the escrow is deliverable on the grantor's death. Generally, however, it is effective upon the second, or actual, delivery.[238]

RECORDING

66. Statutes are in force throughout the United States, and in parts of England, authorizing or requiring the *recording* or *registration* of certain instruments. The purpose of the acts in general is to protect subsequent parties or purchasers from prior secret and fraudulent transactions in regard to the subject-matter of their agreements or conveyances.[239]

IMPLIED CONTRACTS

IMPLIED IN FACT AND LAW

67. Distinction. — Radically different relations are classified under the term *implied contracts*, which must often give rise to confusion and indistinctness of thought. All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual consent. When this intention is not expressed, it may be inferred or presumed from the circumstances as really existing, and then the contract, thus ascertained, may be called an *implied* one. But there is another large class of relations which involve no intention to contract at all. Thus, the law, by one of its

236 113 N. C. 442 (1893).
237 113 Pa. 58 (1886); 91 Ala. 610 (1891).
238 4 Kent's Comm. 454.
239 See *The Law of Property:* Deeds, Mortgages, Recording.

fictions, when it imposes on one a *duty* to another, creates a *promise* from the former to the latter to *discharge* the *duty*. Accordingly, there are:

1. **Implied contracts,** which arise under circumstances that, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract.[240] These are contracts *implied in fact*. Such an implied contract does not differ from an express one, except that in the method of proof, the one is proved by direct, and the other, by circumstantial, evidence. In the one, there is an express agreement, in the other, a state of facts from which a contract may be or must be presumed.[241]

2. **Constructive contracts,** which are fictions of law adapted to enforce legal duties by actions of contract where no proper contract exists, either express or implied. These are contracts *implied in law*.

This latter class does not rest upon agreement; intention is disregarded. The law creates a promise, though none were, in fact, made,[242] when such an assumed promise is necessary to enforce so much of common-law justice as comes within judicial cognizance.[243] If this were originally usurpation, certainly it has now become firmly fixed in the body of the law.

A contract implied in law, or *quasi-contract*, as it is frequently called, rests on no agreement, the law in this class of cases simply prescribing the rights and liabilities of parties under a state of facts where justice demands that one should have a right and the other be subject to a liability.

An examination of the cases will show that much confusion has arisen from the indiscriminate use of the term *implied contract;* and not unnaturally, since a customary course of dealing may give rise to a rule of common justice. But the distinction is, nevertheless, clear; in the one case, the jury may *infer* an agreement; in the other, the court may *imply* a promise.[244]

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240 29 Pa. 465 (1857).
241 Bish. Cont., c. X.
242 *Ibid.*, c. VIII.
243 53 N. H. 627 (1873).
244 150 Mass. 566 (1890).

EXPRESS CONTRACTS EXCLUDE IMPLIED

68. It is an axiom in the law that where the parties have entered into an express contract none can be *implied*.[245] In other words, there cannot exist an express and an implied contract on the same subject, at the same time, between the same parties. A promise is not implied when there is an express agreement, unless the express agreement have been rescinded or abandoned or have been varied by the consent of the parties. Hence, the rule that if there be an express written contract between the parties, the plaintiff in an action to recover for work and labor done, or for money paid, must rest on the written agreement, so long as such agreement remains in force and unrescinded. He cannot under such circumstances recover in an action as much as he has deserved.[246] It makes no difference, in such a case, whether the contract be made by the parties themselves or by others for them.[247]

But when the express contract has been rescinded or abandoned by the parties, or where an end has been put to it by the wrongful act of the party for whom the services were rendered, the other party may in general resort to the implied contract and recover for his labor and materials. In such case, there is no subsisting contract between the parties. There was one, but it is at an end.[248]

WORK DONE OR SERVICES RENDERED

69. It is the general rule of law that if a person procure or request work or labor to be done for him without any agreement as to the compensation to be paid to the person rendering the benefit, in the absence of a family relation, the law will imply a promise on the part of the person requesting such services to pay for the same a reasonable remuneration.[249] It is almost unnecessary to cite illustrations of a rule so well known and fully recognized. If a man employ an architect, a builder, a laborer, or a servant,

245 28 Ill. 383 (1862).
246 96 U. S. 689 (1877).
247 28 Ill. 383 (1862).
248 24 Wend. (N. Y.) 60 (1840).
249 40 Ill. App. 320 (1890), citing Bish Cont., Sec. 217.

he must pay him, in the absence of a direct agreement, the value of his services; and the true value of such services is a question for the jury, taking into consideration the ordinary price paid for such work.[250]

The rule goes to the extent that even where the services are rendered without the express consent of the party charged, if he knowingly receive and accept the benefits thereof, the law will generally imply a promise to pay.[251] But a party cannot be held to pay for benefits forced upon him, which he had no choice but to accept.[252] Thus, where a school district authorized the expenditure of a certain sum in repairing a schoolhouse, and the plaintiff expended twice that sum in making the repairs, immediately before the school commenced, it was held the district could not be considered as promising to pay for the unauthorized repairs by using the house. They had no choice but to either accept the work or abandon the building.[253] So no recovery can be had where one intrudes his services upon another against his will.[254]

70. Voluntary Services.—No action can be maintained on an act voluntarily done for the benefit of another without his request;[255] nor will it make any difference that such services were rendered with the expectation that they would be rewarded. A man, who has nothing else to do, who goes to mowing in his neighbor's meadow, or, when his teams are idle, goes to plowing his neighbor's field without the slightest request to do so, cannot take away from that neighbor the common right to mow or plow for himself when he is unable or unwilling to hire.[256] "The world abounds with acts of this kind, done upon no request; but would more abound with ruinous litigation, and the overthrow of personal rights and civil freedom, if the law were otherwise."[257]

Another phase of this rule is that a party has a right to select and determine with whom he will contract, and cannot

250 93 Pa. 88 (1880).
251 66 Ill. 417 (1872).
252 55 N. Y. 256 (1873).
253 24 Me. 349 (1844).
254 10 La. Ann. 11 (1855).
255 133 N. Y. 372 (1892); 99 Pa. 552 (1882)
256 17 N. J. Law 385 (1840).
257 *Ibid.* 387, by Ford, J.

have another person thrust upon him without his consent. For example, a man who had been supplied with ice by the B company, becoming dissatisfied, terminated his contract and entered into a contract with the C company to furnish him with ice. Subsequently, the C company sold its business to the B company and the latter delivered the ice without notifying the purchaser of the change. In an action on the account for ice sold and delivered, it was held that the B company could not maintain the action.[258]

It makes no difference that the labor or services done by the claimant were beneficial or even meritorious. "If a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as *gratuitous*, and it, therefore, forms no ground of action."[259]

To this rule of law, however, an exception has been established by a class of decisions, that where a person lies under a moral and legal obligation to do an act, and another does it for him under such circumstances of urgent necessity that humanity and decency admit of no time for delay, the law will imply a promise to pay without proof of an actual promise.[260] The cases usually occur in the case of nursing, medical attendance, and funeral expenses. Thus, since a husband is primarily liable for the funeral expenses of his wife, it has been held that an action may be brought for them without showing his request or assent, the claimant having discharged a duty which common decency required.[261]

71. Family Relationship.—Generally, when services have been rendered by one person to another, the law presumes a promise on the part of him who has received them to pay what the services are reasonably worth; but relationship, either by consanguinity or affinity, is a fact which tends to rebut the presumption which the law raises that a promise to pay is intended when personal services are rendered.[262]

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[258] 123 Mass. 28 (1877).
[259] 20 Johns. (N.Y.) 385 (1822), by Platt, J.
[260] 17 N. J. Law 395 (1840).
[261] 53 N. J. Eq. 341 (1895); 1 Hen. Bla (Eng.) 91 (1788).
[262] 43 Pa. 107 (1862).

"The reason for this exception to the ordinary rule is that the household family relationship is presumed to abound in reciprocal acts of kindness and good will, which tend to the mutual comfort and convenience of the members of the family and are gratuitously performed; and, where that relationship appears, the ordinary implication of a promise to pay for services does not arise, because the presumption which supports such implication is nullified by the presumption that, between members of a household, services are gratuitously rendered."[263] The presumption that the services of a member of the family are gratuitous is not by any means conclusive. It may be rebutted by showing a contract to pay for such services, or such facts and circumstances, as will warrant a jury in finding that the services were rendered in the expectation by one of receiving, and by the other of making, compensation therefor.[264]

The presumption is naturally strongest in the case of a parent and child, and decisions, in some states, have spoken of it as if restricted to cases where such a relationship in blood existed.[265] But in innumerable decisions, it has been applied to other relationships, such as that of brother and sister and "all members of a household however remote their relationship may be, and, indeed, even to those who, though not of kin, stand in the situation of kindred in one household."[266] In Pennsylvania, however, the cases decide that, when the parties are parent and child or members of the same family, the relationship excludes the implication of a promise. In all cases, except that of parent and child, there must be evidence, *beyond the relationship*, that the creation of no debt was intended.[267] As between brother and sister, there is no presumption that they live together as members of a family.[268] Family relationship must be proved by the party who asserts it, the intention to be gathered from the facts and circumstances of the case.[269]

[263] 54 N. J. Law 343 (1892), by Chancellor McGill.
[264] 28 Iowa 548 (1870).
[265] 69 Iowa 637 (1886).
[266] 54 N. J. Law 343 (1892).
[267] 118 Pa. 20 (1888).
[268] 114 Pa. 371 (1886).
[269] 154 Pa. 230 (1893); 7 Sup. Ct. 206 (1898); 112 Pa. 290 (1886).

72. Mistaken Services.—If the parties undertake to carry out a supposed agreement which by mutual mistake is no contract at all, the party doing the work is, nevertheless, entitled to claim from the party benefited the reasonable value of his services.[270] So, too, if there be a mutual mistake as to the consideration.[271] But this rule is purely an equitable one and based upon the benefits received and assented to by the defendants. It cannot be applied to the case where a claimant blunders upon another person's property, or by mistake does work on another man's contract.[272] A mechanic employed to alter one man's house, who goes by mistake to another which happens to be unoccupied and, before his mistake is discovered, does work, cannot charge the owner who neither contracted for, desired, nor consented to the work.[273]

MONEY HAD AND RECEIVED

73. The principle is well established that if a party receive money to which he is not justly and legally entitled, and which he ought not in good conscience to retain, the law regards him as the receiver and holder of the money for the use of the lawful owner of it, and raises an *implied promise* on his part to pay over the amount to such owner; and, if the money be withheld from the owner, an action may be maintained for money had and received.[274]

Thus, in an English case, it appeared that the plaintiff had paid rent to the defendants for certain premises which he held under them as lessee, and it afterwards turned out that the defendants had no title. The plaintiff was ejected and also compelled to pay the rightful owners the rent that had become due while he held under the defendants. The court was of the opinion that an action for money had and received was maintainable by the plaintiff for the recovery of the rent previously paid to the defendants.[275]

The action for money had and received is in the nature of a bill in equity, and while the suit is under the common-law

270 18 Pick. Mass. 229 (1836).
271 24 Kan. 38 (1880).
272 37 Mich. 332 (1877).
273 13 Ore. 250 (1886).
274 59 Md. 255 (1882).
275 10 B. & C. (Eng.) 234 (1829).

form of an action of assumpsit, the *gist* of the action is that the party defendant is obliged by the ties of equity and natural justice to refund the money.[276] "It lies for money paid by mistake, or upon a consideration which happens to fail; or for money got through imposition (express or implied) or extortion, or oppression, or an undue advantage taken of the plaintiff's situation contrary to laws made for the protection of persons under those circumstances."[277]

74. Mistake of Fact.—Where one party pays and another receives money under a *mistake* or misapprehension of a material fact, it is generally held that the money may be recovered from the party not entitled to retain it.[278]

An error of fact takes place either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist. A contract made upon an assumed state of facts as to which there is a mutual mistake may be rescinded on discovering the mistake, and the party paying money upon it may recover it. Thus, if the parties to an accord and satisfaction, in settling a claim, act under a mutual mistake of facts, there is nothing in the nature of the transaction which prevents a court of law from correcting the mistake or relieving from its consequences in a proper action for that purpose.[279]

It is needless to say that the courts will not relieve against every mistake made by a party in his business transactions.[280] A mistake in a matter of *fact*, to be a ground of relief, must be of a material nature, inducing or influencing the agreement or in some matter to which the contract is to be applied.[281] It must be a mistake not remotely, but directly, bearing upon the act against which relief is sought. It is necessary, also, to show total failure of consideration; the mere fact that the plaintiff used bad judgment and made a bad bargain will not entitle him to relief.[282]

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276 9 Conn. 545 (1833).
277 2 Bur. (Eng.) 1,005 (1760), by Lord Mansfield.
278 139 Mass. 513 (1885).
279 11 Hun (N. Y.) 208 (1877).
280 61 Wis. 255 (1884).
281 84 N. Y. 430 (1881).
282 5 M. & W. (Eng.) 432 (1839); 92 Ind 436 (1883).

75. Mistake of Law. — It is a rule of law, supported by a majority of the decisions, that money paid with a full knowledge of all the facts, although it may be in ignorance of, or under a mistake of, law, cannot be recovered;[283] for, ignorance of the law is no excuse. In the leading English case on this subject, the court said: "Every man must be taken to be cognizant of the law, otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case."[284]

In the United States, the prevailing opinion supports the strict rule both in the federal courts[285] and in those of a great majority of the states.[286] In some states, the contrary doctrine has been asserted, noticeably in Connecticut, where the supreme court said: "When money is paid by one under a mistake of his right and duty and which he was under no obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered in an action . . . whether the mistake be one of law or fact."[287]

However strongly the general common-law rule may be laid down, it is not denied at the present day that courts of equity have, within certain limitations, power to relieve against mistakes in law as well as fact,[288] "if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it." It is said, however, in the case last quoted, that "relief has never been given in the case of a simple money demand by one person against another, there being between those two persons no fiduciary relation whatever and no equity to supervene by reason of the conduct of either of the parties."[289] The supreme court of the United States has said, "that a clearly established misapprehension of the law does create a basis for the interference of courts

283 3 Ch. Div. (Eng.) 351 (1876).
284 2 East (Eng.) 469 (1802), by Lord Ellenborough.
285 10 Pet. (U. S.) 137 (1836).
286 1 Wend. (N. Y.) 355 (1828).
287 19 Conn. 548 (1849); 59 Conn. 320 (1890).
288 141 U. S. 260 (1890).
289 L. R. 3 Ch. D. (Eng.) 351 (1876), by Lord Justice James.

of equity, resting on discretion and to be exercised only in the most unquestionable and flagrant cases."[290]

The whole question is a difficult one. It was argued before Lord Mansfield that all the laws of the country are presumed clear, evident, and certain. But the chief justice replied, "as to the certainty of the law, it would be very hard upon the profession if the law were so certain that everybody knew it; the misfortune is that it is so uncertain that it costs much money to know what it is, even to the last resort."

76. Involuntary Payments—Duress.—Where the payment of money is compelled by **duress,** or unlawful compulsion, it may be recovered.

To constitute the coercion, or duress, which will be regarded as sufficient to make a payment involuntary, there must be some *actual* or *threatened* exercise of power, possessed, or believed to be possessed, by the party exacting or receiving the payment over the *person* or *property* of another, from which the latter has no immediate relief than by making the payment.[291] The doctrine established by the authorities is that a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid.[292]

Duress of the person is either by imprisonment, or by threats, or by an exhibition of force which apparently cannot be resisted. Duress of goods may exist where one is compelled to submit to an illegal exaction in order to obtain them from one who has them in possession, but refuses to surrender them unless the exaction be submitted to.[293]

ILLUSTRATION.—In an old English leading case involving duress of goods, the plaintiff had pledged goods for twenty pounds, and, when he offered to redeem them, the pawnbroker refused to surrender them, unless he were paid ten pounds for interest. The plaintiff submitted to the exaction, but in a suit was held entitled to recover all that had been unlawfully demanded and taken. "This," said the court, "is a

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[290] 141 U. S. 260 (1890); see Am. Law Reg., Vol. 33, p. 336 (1894).
[291] 95 U. S. 210 (1877).
[292] 4 Gill (Md.) 425 (1846).
[293] 45 Mich. 569 (1881).

payment by compulsion; the plaintiff might have such an immediate want of his goods that an action of trover would not do his business. We must take it he paid the money relying on his legal remedy to get it back again."[294]

So, also, it was held that one could recover money which he had paid to release his goods from an attachment which was sued out with knowledge on the part of the plaintiff that he had no cause of action.[295]

77. It is, however, a well-established rule of law that if a party with a full knowledge of the facts, voluntarily pay a demand unjustly made on him, or attempted to be enforced by legal proceedings, he cannot recover the money as paid by compulsion, unless there be fraud in the party enforcing the claim.[296] The case is not altered by the fact that the party so paying protests that he is not answerable and gives notice that he will bring action to recover the money. He has an opportunity in the first instance to contest the claim at law. He has, or may have, a day in court; he may plead and make proof that the claim is such that he is not bound to pay.[297] "Where a man demands money of another as a matter of right, and that other, with full knowledge of the facts upon which the demand is founded, has paid a sum, he never can recover the sum he has so voluntarily paid. He has an option either to litigate the question or to submit to the demand and pay the money."[298] If, in fact, a party be under no duress, restraint, or compulsion, a protest is of no avail, and, in case of duress, is then only evidence tending to show that the alleged payment was the result of duress.[299]

To take a case out of the rule there must be *compulsion* actual, present, and potential in inducing the payment by force of process available for instant seizure of person or property on a demand really illegal. Where the payment is voluntary, a protest with notice of an intention to reclaim,

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294 2 Stra. (Eng.) 915.
295 114 Mass. 364 (1874); 7 Cush. (Mass.) 125 (1851).
296 10 Ad. & Ell. (Eng.) 82 (1839); 31 Pa. 173 (1855).
297 5 Wall. (U. S.) 720 (1866).
298 5 Taunt. (Eng.) 144 (1813), by Gibbs, J.
299 101 Pa. 304 (1882); 136 Pa. 62 (1890).

is not sufficient to sustain a recovery; the voluntary character of the payment remains notwithstanding the notice.[300]

A voluntary payment of the debt, or of a claim against another person, will not render that person liable to repay the money without an express promise. No man can pay another person's debt without a request to do so and then charge him therefor.[301]

GOODS SOLD AND DELIVERED

78. If goods be sold and delivered to a party who accepts them, or appropriates them to his own use, without expressly agreeing to pay for the same, the law implies a promise on his part to pay for them their reasonable value.[302] Thus, where a person in the habit of dealing at a store notified the proprietor not to give credit to his family, but subsequently permitted members of his family to procure goods for the family use, which were so used, he was held responsible for the payment of their value.[303]

The intention of the purchaser is indicated by his declarations and acts, the nature of the goods, and the circumstances of the case. If the buyer intend to retain possession of the goods and manifest that intention by a suitable act, it is an actual acceptance. The law will apply an assumpsit, and the owner of the goods will be permitted to recover in that form of action when the articles have been actually applied, appropriated, and converted by the person receiving the same to his own beneficial use.[304]

Thus, where the publisher of a newspaper forwarded a copy properly directed by mail to a party who was not a regular subscriber therefor, but who received the same regularly from the post-office and used it, neither returning the same nor giving other notice to the publisher, it was held the law would imply, in such a case, a promise to pay such party, according to the usual terms of such publication.[305]

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[300] 136 Pa. 78 (1890), citing 119 Pa. 212 (1888).
[301] 57 Mo. 135 (1874).
[302] 155 Pa. 160 (1893); 15 M. & W. (Eng.) 85 (1846).
[303] 158 Pa. 380 (1893).
[304] 5 Car. & P. (Eng.) 228 (1832).
[305] 44 N. H. 115 (1862).

79. Goods Sold to a Committee.—An interesting point to be noted in this connection is the liability of a committee or political organization for goods sold and delivered at its request. If the members of such a committee concur in giving an order for goods, they are personally liable for their cost; the committee of an organization who engage in an enterprise are liable for the debts they contract and all are included in such liability who *assent* to the undertaking or subsequently *ratify* it.[306]

An illustration is furnished by a case where a political party at a mass meeting resolved to give a public dinner in celebration of a victory, a committee being appointed to make the arrangements. At the conclusion of the meeting, in the words of a reporter, "the plaintiff was called in and directed to prepare a dinner for one thousand persons and serve it at Taaffe's Warehouse, where four thousand people, of all political parties, subsequently partook of it with wonderful cordiality." The committee was held jointly liable for the bill.[307]

CONTRACTS IMPLIED IN EXPRESS ONES

80. It is a rule of law that every contract must be construed as if those terms which the law will imply were expressly introduced into it; in other words, "what is implied in an express contract is as much a part of it as what is expressed."[308]

Several of the subjects which would properly come within the limits of this broad rule are of sufficient importance to merit separate discussion; for example, the implied covenants on a sale of real estate[309] and the implied warranties that accompany a sale of personal property.[310]

Where one *agrees* to perform services for another, the law implies that he undertakes to perform such services with integrity and fidelity.[311] And where a contract calls for

306 97 Pa. 493 (1881).

307 6 W. & S. (Pa.) 67 (1843); 44 Mich. 431 (1880).

308 Bish. Cont. 421.

309 See *The Law of Property:* Private Grants—Deeds.

310 See *The Law of Property:* Sales of Personal Property.

311 4 S. & R. (Pa.) 249 (1818); 7 W. N. Cas. (Pa.) 92 (1879).

the performance of services, each of the parties is entitled to demand of the other the exercise of ordinary care and skill in its performance. The rule applies to all kinds of services. One who contracts to do all the mill work necessary in the construction of a grist mill, is bound to do it in a workmanlike manner so that it will answer the purpose for which it is designed.[312]

The rule is general, as previously stated, that whenever labor or services are performed at the request of another there is an implied promise raised by the law to pay for such services. A corollary to this proposition is equally general that the skill and care required in doing the work in order to deserve compensation is that ordinarily possessed and exercised by others in like calling.[313]

The physician and the attorney undertake in the practice of their respective professions that they are possessed of that degree of knowledge and skill therein which usually pertains to the other members of their profession. Beyond this measure of skill and diligence, the law makes no exaction. They are not held as guarantors of success; if actual damages be sustained from the neglect or unskilful performance of such services, they may be recovered by the injured party to the contract.[314]

When a person engages to work for another, he impliedly undertakes that he has a reasonable amount of skill in the employment and engages to use it and a reasonable amount of care; a failure to do so will prevent him from recovering the contract price, and limit him to what the work is reasonably worth, or the employer may recoup all the damage he may sustain for want of reasonable skill, or for want of the observance of reasonable care in executing the work.

81. In the enforcement of the obligation of contracts, the courts are not confined to the mere naked words of the written or spoken agreement. The contract which the law

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[312] 25 Pa. 382 (1855).
[313] 49 N. J. Law 685 (1887); 70 Ill. 268 (1873).
[314] 19 Vt. 54 (1846).

will enforce is the undertaking of the parties *plus* the law of contracts which the parties will be presumed to have known and according to which every agreement will be interpreted.[315]

WAIVER OF TORT AND SUING IN ASSUMPSIT

82. The rule at common law was that whatever was a tort in its inception could not by any subsequent transaction be made the foundation of an implied assumpsit. This rule has been gradually relaxed, and the general principle is now established that where one has injuriously appropriated or converted the property of another to his own use, obtaining value therefor, the injured party may waive the tort and sue in assumpsit to recover the amount thus wrongfully acquired.[316] Thus, where goods deposited with a person are wrongfully sold by him, he will be liable to the owner in trover, or the latter may waive the tort and bring assumpsit for the value of the goods as if sold and delivered.[317]

There is considerable difficulty in stating how far the courts will go in permitting a waiver of the tort and a suit in assumpsit. But the weight of authority, as shown by the decisions of a majority of the states, appears to be in favor of permitting a waiver of the tort and a suit in assumpsit, even in those cases where the wrong-doer has not converted the property taken into money but has retained it for his own use.[318] An action for money had and received is a conclusive election to waive the tort and the damages incident thereto,[319] and the commencement of an action of trespass or trover is a conclusive election the other way.[320]

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315 Bish. Cont., Sec. 256.

316 77 N. Y. 144 (1879); 5 Pick. (Mass.) 285 (1827); 1 Hill (N. Y.) 234 (1841), and note to same, p. 240; 1 Yeates (Pa.) 248 (1793); 35 Pa. 351 (1860).

317 5 Hill (N. Y.) 577 (1843); 27 N. J. Law 43 (1858).

318 32 Conn. 563 (1865); 44 Pa. 9 (1862); 81 Pa. 445 (1876).

319 121 N. Y. 161 (1890).

320 67 Ill. 378 (1873).

THE LAW OF CONTRACTS

(PART 2)

PARTIES TO CONTRACTS

1. It is a first principle that in whatever different capacities a person may act, he never can contract with himself nor maintain an action against himself.[1] In a common-law court one cannot be both plaintiff and defendant in the same case,[2] even though on the one side he appear in a representative capacity;[3] and, as a contract is an obligation enforceable at law, it follows that there must be at least two parties to a contract.

There may be any number of persons to a contract, so long as there are more than one and the number of parties, and who they are, is ascertained or ascertainable at the completion of the contract. A promise made to everybody is not a promise to any person; and a promise by a multitude, or an indefinite and unidentified number of individuals, to jointly do a particular thing, cannot be enforced.[4] An offer may be made generally, as in the case of a general offer of a reward, but to complete the contract it must be accepted by a definite party or parties.

2. The parties to a contract must exist; that is to say, if the party purport to be a natural person, he must be living. A contract with a fictitious person is void.[5] In the case of an artificial person, such as a corporation, it must have a legal existence to entitle it to contract.[6] It is also requisite to the validity of all contracts that the parties thereto are legally capable of contracting.

[1] 6 Pick. (Mass.) 316 (1828).
[2] 76 Ill. 355 (1875).
[3] 58 N. Y. 425 (1874).
[4] 81 Fed. Rep. 282, 283 (1897).
[5] 1 Camp. (Eng.) 130 (1807).
[6] 63 Mo. 268 (1876).

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Incapacity may result either from a physical or mental condition which excludes real consent, or it may result from a rule of the common law or a statute which prevents certain classes of individuals from entering into a binding agreement, or restricts or limits their powers in this respect.

COMPETENCY

INFANTS

3. An **infant** is a person under the age of twenty-one years.[7] This is the age at which, at common law, a minor, whether male or female, attained his or her majority; but the age selected is purely arbitrary, and, in a number of states, females reach their majority at eighteen. In the absence of a statute to the contrary, the common-law rule prevails.

4. It is difficult to state a rule as to what contracts of an infant are void. The dicta in the early English decisions indicate that the criterion in each case was whether or not the transaction were beneficial to the infant, such transactions as were prejudicial to his interest being held null and void.[8] In the practical application of this principle, however, so many contradictions are to be found that modern writers are inclined to abandon this test altogether. Most of the acts of infants are voidable only and not absolutely void; and it is deemed sufficient if the infant be allowed, when he attains maturity, the privilege to affirm or avoid in his discretion his acts done and contracts made in infancy.[9] The distinction between an act that is voidable and one that is void is determined by arbitrary rules of law. A void act cannot be ratified by the infant on attaining majority.[10]

5. The contracts of infants are, therefore, divided into three classes: (1) Those that are valid and bind the infant

[7] Rapalje & Lawrence, Law Dict., Vol. 1, p. 650.
[8] 13 Mass. 237 (1816); 26 Am. Law Rev. 502 (1892).
[9] 2 Kent's Comm. 234.
[10] 3 Cr. C. C. (U. S.) 276 (1827)

with or without his affirmance on attaining majority; (2) those that are void absolutely; and (3) those that are voidable and may be ratified by the infant on attaining majority. In this last class are included most of the ordinary cases of contract, the first two classes constituting, in a sense, exceptions to the more general rule.

VALID CONTRACTS OF INFANTS

6. Legal Obligations.—Whatever an infant is bound to do by law, the same will bind him although he does it without suit at law.[11] The authorities, says Lord Mansfield, are so express upon this point that it is unnecessary to cite instances. Thus he may join with his cotenants in making partition; he may pay rent; or if his acts take effect from an authority with which he is entrusted, as where he acts as an executor or trustee, he cannot disaffirm his acts which the law would compel him to perform.[12]

7. Marriage.—Executed contracts of marriage by the common law, both in England and the United States, are as binding as if made by adults; at common law, the age of consent is fixed at twelve in females and fourteen in males.[13] The statute laws of many of the states prohibit the issuing of a marriage license or wedding certificates to minors without the consent of their parents or guardians, under severe penalties. But the effect of these statutes is directory only, to prevent as far as possible the solemnization of such marriages, and their effect is not to render such marriages void, when duly solemnized.[14]

8. Apprenticeship.—Binding himself as an apprentice for instruction in a useful art or trade has been considered an act beneficial to the infant, and, therefore, valid, if the wages be a fair compensation for his services and the contract contain no inequitable advantage to the master.[15] Under the English decisions, the question whether the

[11] Co. Litt. 172 *a*.
[12] 3 Bur. (Eng.) 1794, at p. 1,801 (1765).
[13] 1 Gray (Mass.) 119 (1854).
[14] See *The Law of Husband and Wife:* Solemnization.
[15] 20 R. I. 147 (1897).

provisions in a contract of apprenticeship be or be not equitable as regards the infant, depend largely upon whether they were at the time of the agreement common to labor contracts, or were, in the condition of trade then prevailing, such as the master might reasonably be justified in imposing as a protection to himself, and also upon whether the wages were a fair compensation.[16]

As stated in an English case, "it is plain that the contract by which an infant binds himself to learn an art or trade to his own future profit is *prima facie* valid and binding. But no doubt the law has engrafted on that general principle certain well-known and defined exceptions. It has been held from the time of Lord Coke that an infant cannot bind himself to be liable to a penalty; and the contract to impose a penalty on an infant is void. Again, it has been held, that a contract by which an infant renders his vested interest subject to forfeiture is void against the infant; and again, wherever you find extraordinary or unusual stipulations contained in a contract, either of apprenticeship or services, there the court at least must be on the watch lest the infant should be held to be bound by a contract which is not reasonable and which is not good in law."[17] Thus, an apprenticeship contract, which bound the infant apprentice to enter into no engagements without the master's permission, but did not in any corresponding way bind the master to provide engagements or employment for the apprentice, was held unreasonable and not binding.

In England and most of the United States, there are statutes regulating the mode of binding apprentices which must be consulted for the details of the subject. An apprentice can be bound only by indenture; if the indenture be defective in not strictly complying with the statute, in some states, it is held voidable by the infant, and, in other states, absolutely void.[18]

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[16] 3 Q. B. Div. (Eng.) 229 (1877); 12 Q. B. Div. (Eng.) 352 (1884); 45 Ch. Div. (Eng.) 430 (1890).

[17] 45 Ch. Div. (Eng.) 430 (1890), by Lord Justice Fry.

[18] Am. & Eng. Encyc. Law (2d Ed.). Vol. 2, p. 489, Apprentices, citing 3 Esp. (Eng.) 188 (1800); 18 Conn. 33 (1847).

9. Enlistment.—Every citizen, whether of age to make contracts generally or not, if of sufficient capacity, is under obligation to render military service to the country when required, and is subject to draft for such service.[19] What a minor can be compelled to do, he may contract to do voluntarily under the terms of a statute granting authority to enlist minors,[20] and if he be lawfully subject to military duty and be lawfully called on to enlist, his contract of enlistment is as valid and binding as that of an adult.[21]

10. Necessaries.—An infant is liable for the actual value of necessaries furnished to him. The word **necessaries** is not confined in its strict sense to such articles as are necessary to support life but extend to articles fit to maintain the particular person in the state, degree, and station of life in which he is.[22]

Lord Coke considered the necessaries of an infant to include victuals, clothing, medical attendance, and "good teaching or instruction whereby he may profit himself afterward."[23]

11. There is some dispute as to whether the infant is liable on his express contract for necessaries, or whether the vendor must sue on an implied assumpsit, but in either case the real consideration is open to inquiry; the infant is not bound to pay for the articles furnished more than they are really worth to him as articles of necessity, and, consequently, he is not precluded by the form of the contract from inquiring into the real value of the necessaries furnished.[24]

The burden of proving the existence of an actual necessity lies on the vendor of the articles in question; he contracts with an infant at his peril. It is the vendor's duty to acquaint himself with the infant's circumstances and necessities. Where the supply of an article otherwise necessary has been grossly excessive, the court may declare it, as a matter of law, inordinate.[25] So, too, if the infant reside

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19 30 Conn. 438 (1862).
20 1 Mas. (U. S.) 71 (1816).
21 24 Pick. (Mass.) 227 (1836).
22 6 M. & W. (Eng.) 46 (1840); L. R. 4 Ex. (Eng.) 32 (1868).
23 Co. Litt. 172 *a*.
24 2 Kent's Comm. 240.
25 6 W. & S. (Pa.) 80 (1843).

with his father or guardian who gives him his care and protection and is willing to supply his wants, he cannot bind himself even for what would otherwise be necessaries.[26] If, however, a guardian refuse to furnish necessaries for his ward, the infant may purchase, and a stranger may supply, such articles as are required to meet his wants, and the infant's estate will be liable.[27] If an infant be married, the necessaries for his wife and children are legally necessaries for him.[28]

12. What in any particular case will be held necessaries is a mixed question of law and fact, the province of the court and jury in determining which is thus briefly stated: "When it is sought to enforce a contract against an infant on the ground that it was for necessaries, then *prima facie* necessity of the commodities supplied is a question for the court. If the court holds them not *prima facie* necessary, evidence may be given of special circumstances rendering them in fact necessary, and the legal sufficiency of such evidence is a question for the court; if on these preliminary considerations the court decides that there is evidence on which the supplies in question may reasonably be treated as necessaries, then it is for the jury to say whether they were in fact necessaries for the defendant under all the circumstances of the case."[29]

13. The term *necessaries* is generally confined to such commodities as supply *personal needs;* the wants to be supplied are personal; either those for the body, as food, clothing, lodging, and the like; or those necessary for the proper cultivation of the mind, as instruction suitable and requisite to the useful development of the intellectual powers, and qualifying the individual to engage in business when he shall arrive at the age of manhood. Thus, a minor has been held not liable for the expense of repairing his real estate, although such repairs were needed to prevent serious

[26] 4 Watts (Pa.) 80 (1835); 114 Mass. 397 (1874).
[27] 4 W. & S. (Pa.) 118 (1842); see *The Law of Parent and Child, The Law of Guardian and Ward.*
[28] 2 Kent's Comm. 240.
[29] Poll. Cont., pp. 68-71.

and immediate injury to the property.[30] The fact that he has real estate calls for the appointment of a guardian through whose agency such repairs can be made. Nor will an infant be liable on his contract employing an attorney to examine his title to property.[31]

14. The law does not deem an infant competent to carry on business on his own account, and for that reason does not hold him liable for articles furnished him as a merchant or trader, even though the articles were actually beneficial.[32] Thus, in an action brought to recover the price of a chair and other articles of furniture designed to be used in furnishing a barber shop for a minor, the court held the articles in question clearly not necessaries, the law not contemplating that a minor should open a shop and become the proprietor of a business.[33] If the articles had been a reasonable number of hand tools, such as are ordinarily provided by a journeyman, the case would have been different.

15. The word *necessaries* is not confined, however, to such articles as are necessary merely to support life, but is extended to articles fit to maintain the particular person in the state, station, and degree of life in which he is. For mere articles of ornament or luxury an infant will not be responsible, but, if they be not strictly of this description, the question arises whether they were bought for necessary use and are suitable for the infant's age, state, and degree. Thus, a bicycle was held not necessary for a boy of seventeen years of age who worked in a shoe shop a mile from his father's house.[34]

At common law, an infant is not liable for money lent, although expended by him in the purchase of necessaries; but, in equity, the lender could be subrogated to the rights of the seller of the goods as against the infant.[35] The later cases in the United States have adopted the view that an

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[30] 12 Metc. (Mass.) 559 (1847).
[31] 48 Neb. 391 (1896).
[32] 12 Metc. (Mass.) 559, 563 (1847).
[33] 165 Mass. 303 (1896); 6 M. & W. (Eng.) 42 (1840); 5 Ad. & El. (Eng.) N. S. 606 (1844)
[34] 145 Mass. 558 (1888); 25 N. Y. App. Div. 388 (1898).
[35] 10 Vt. 225 (1838).

infant, being liable to one person for necessaries purchased, may make himself liable to another, who pays such bill for him at his request, the liability being limited to the reasonable worth of the necessaries and not measured by the amount actually paid.[36]

VOID CONTRACTS OF INFANTS

16. It was formerly held by all the courts that every contract of an infant not beneficial to him was void.[37] As already stated, the tendency now is to explain away or discard this doctrine and treat most contracts as voidable, leaving it to the infant, on attaining majority, to affirm or disaffirm the transaction.[38] In the transition from the old to the new doctrine the words *void* and *voidable* have been used indiscriminately, and it is difficult to speak of any class of contracts by infants as absolutely void,[39] except that a power of attorney given by an infant is absolutely void and incapable of ratification by the infant on attaining majority. Thus, a warrant of attorney by a minor to confess judgment is void no matter under what circumstances it is given, and on showing infancy should be vacated.[40]

17. In England, the contracts of infants are governed by the Infants Relief Act, 1874, which provides that (1) all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void; provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute or by the rules of common law or equity, enter, except such as now by law are voidable; (2) no action shall be brought whereby to charge any person, upon any promise made, after full age to pay any debt contracted during

[36] 83 Me. 305 (1891).
[37] 26 Am. Law Rev., p. 502.
[38] 37 Vt. 647 (1865).
[39] 15 Wend. (N. Y.) 631 (1836).
[40] 22 Pa. 337 (1853).

infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.[41]

The operation of this act, it is declared, seems to be to reduce all voidable contracts of infants ratified at full age, whether the ratification be formal or not, to the position of agreements of imperfect obligation, that is, which cannot be directly enforced but are valid for all other purposes.[42]

VOIDABLE CONTRACTS OF INFANTS

18. As before stated, the general doctrine is that an infant's contract is voidable at his option and, since infancy as a defense is a personal privilege, *at his option only*. All agreements, transactions, or contracts not within the exceptions already discussed may be disaffirmed by him, either before or upon the attainment of his majority. Nor has an infant any more capacity to dispose of his property by gift than he has by contract, and he is just as much entitled to protection from the consequences of an improvident gift of his property as he is to protection from the consequences of an improvident contract respecting it. The emancipation of an infant by his father does not enlarge or affect his capacity to make a contract, and its only effect is to release him from parental control and give him a right to his earnings.[43]

19. Employment.—A special contract by a minor for his services is voidable by him at his option, and, upon avoiding it, he may recover by an action what his services were reasonably worth.[44] Thus, an infant with the assent of his mother agreed to work for a creditor of his deceased father, one-half of his wages to be applied to the payment of the claim. When the debt had been thus paid, the creditor discharged him. It was held that the infant was not precluded when he became of age from avoiding the agreement and

[41] 37, 38 Vict., c. 62 (1874).

[42] Poll. Cont., p. 62; L. R. 24 Q. B. Div. (Eng.) 166 (1889); (1892) L. R. 2 Q. B. Div. (Eng.) 543.

[43] 37 Vt. 647 (1865).

[44] 104 Pa. 26 (1883); 11 Vt. 273 (1839); 19 R. I. 217 (1893); 110 Mass. 137 (1872).

recovering the balance of the wages that had been credited to his father's debt.[45]

The fact that an infant may enter into a contract of employment binding on his employer, and capable of ratification by him, does not counteract the father's right to the services of his minor child, or his right to reclaim the custody and services of the infant, who may have hired himself to another without the parent's consent. But, as between the infant and the employer, it remains binding until avoided by the infant, or until the parent asserts his paramount right to put an end to it by reclaiming his minor child.[46]

20. Parents, being under an obligation to support their children, are entitled to their service during infancy. But, although the father is entitled to such services, he may waive that right and emancipate his child, or the child may, by the father's consent, be entitled to his own earnings.[47] Such intention of the parent may be inferred from the circumstances, and when the circumstances in any particular case warrant the conclusion that it was understood that the minor might receive his earnings, payment to him will be good, as the parent is concluded by his consent.[48]

21. Partnership.—A partnership is also one of the voidable class of contracts into which an infant may enter, and, if he disaffirm the contract, he will not be liable for firm debts contracted during his infancy.[49] If, however, on coming of age he continue in the business and do nothing to disaffirm the partnership, he will be held liable for firm debts, as a general partner.[50]

22. Sales and Purchases.—Contracts of sale by an infant, whether the same relate to real estate or personal property, are voidable and may be ratified or avoided at majority in the manner to be described later.[51] This is true,

[45] 150 Mass. 448 (1889).
[46] 1 Coldw. (Tenn.) 612 (1860); 1 Pars. Cont., p. 310.
[47] 3 Barb. (N. Y.) 115 (1848); 11 Vt. 258 (1839); 66 Ark. 409 (1899); see *The Law of Parent and Child.*
[48] 1 Vt. 41 (1827).
[49] 35 Minn. 488 (1886).
[50] 123 Mass. 88 (1877); 16 Phila. 143 (1883)
[51] 9 Wall. (U. S.) 617 (1869).

also, of contracts of purchase. The retention or sale of the property, after becoming of age, amounts to, or is evidence of, an affirmation. Therefore, if an infant buy land and execute a purchase-money mortgage for the same, he cannot, after he comes of age, affirm the conveyance and at the same time disaffirm the mortgage.[52] A lease is a voidable contract, and an infant who has leased premises for a term and, after reaching full age, holds over after its expiration, will be treated as ratifying the lease.[53]

23. Negotiable Instruments. — Promissory notes given or indorsed, or bills of exchange accepted, by infants are voidable, not void. If a bill or note be drawn to the order of an infant payee and by him indorsed over to a third person, a valid title is transferred and the plea of infancy cannot be set up by the maker. The privilege of infancy is personal and can be made by the infant only, and the drawer is liable.[54]

24. Suretyship. — By some early authorities, an infant's contract of suretyship was deemed void on the ground that in no event could such a transaction prove beneficial.[55] But other and later authorities hold such a contract voidable. It has been held that the mere fact that the infant assumed to become a surety for another, is not, in itself, ground sufficient to say that such dealing was wrong to the infant. The most that can be said is that the court cannot see how the infant could derive benefit from such an act; but that is not sufficient, if he himself after arriving at maturity deliberately have determined the matter for himself.[56]

25. Compromises. — If an infant submit a claim to arbitration, or make a compromise of an action, either in contract or tort, he can, on attaining majority, set aside the agreement.[57] The court will, however, not extend this principle so as to permit fraud or injustice, and, if the infant have

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[52] 159 Pa. 146 (1893).

[53] 26 W. N. Cas. (Pa.) 249 (1890).

[54] 1 McCrary (U. S.) 384 (1880); 3 Wend. (N. Y.) 479 (1830); 3 Doug. (Eng.) 65 (1782); 1 Pa. 497 (1845); see *The Law of Commercial Paper*.

[55] 4 Conn. 376 (1822).

[56] 11 S. C. 412 (1878); 112 Mass. 403 (1873); 11 S. & R. (Pa.) 305 (1824); 61 Vt. 481 (1889).

[57] 170 Ill. 610 (1897); 66 Ark. 408 (1899).

received reasonable compensation, he can recover no more. If the compensation previously made were inadequate, such other sum may be awarded as will amount to reasonable satisfaction.[58]

DISAFFIRMANCE OF VOIDABLE CONTRACTS

26. The privilege of avoiding his contracts is personal—conferred on the infant alone. During his life no other party can take advantage of his privilege, and the privilege not being transferable cannot be exercised by assignees or privies in estate.[59] Although the privilege is personal, it extends to the legal representatives of the infant, who may, after his death, affirm or disaffirm the contract of the infant, in regard to the matters where they succeed to his interest or represent him.[60] An infant's contracts in reference to the sale or conveyance of land may be avoided by his heirs or privies in blood who succeed to his estate.

27. If the contract of the infant be executory, his right to disaffirm it is sufficiently exercised if he merely plead his infancy as a defense in an action on the contract, and, if he have not expressly affirmed it since attaining his majority, the infancy is a perfect defense since it does not bind him without such confirmation.[61]

28. An executed contract of an infant has legally no more force than an executory one, but there is this distinction between them: By the executed contract, a right, or title, has passed to the other party, which is described as voidable and which can be divested only by some sufficient act of repudiation on the part of the infant on or before attaining majority.[62]

The sufficiency of an act of disaffirmance depends somewhat on the character and solemnity of the transaction in which the parties were engaged. But, in any case, the avoidance must be by some act clear and unmistakable in its

[58] 6 Mass. 78 (1809).
[59] 76 Ala. 343 (1884); L. R. 2 Eq. (Eng.) 481 (1866).
[60] 59 Me. 103 (1871).
[61] 56 Me. 102 (1868); Bish. Cont., Sec. 937
[62] 9 Wall. (U. S.) 617 (1869); 33 Conn. 201 (1866); 40 Neb. 195 (1894).

character.[63] As to what is a reasonable time for an infant to disaffirm contracts made during his infancy is a mixed question of law and fact, to be determined from the facts and circumstances in each particular case.[64]

29. In order to disaffirm a deed executed by an infant, it has been held that the act of disaffirmance must be of as high solemnity as the original transaction. A conveyance of the same property to another party after coming of age is such a disaffirmance.[65] So, also, an action of ejectment may be brought by the infant, or a bill in equity filed to cancel the deed.[66]

An infant may disaffirm his contract of purchase of property of any kind by rescinding it, returning the property and bringing an action to recover the consideration previously paid.[67] The seller in such a case is not entitled to recoup from the use of the property while in the possession of the minor.[68]

Where an infant elects to disaffirm his contract, he must disaffirm the whole of it; he cannot affirm part and disaffirm the rest. Thus, where an infant buys land and gives a mortgage to secure part of the purchase-money, he cannot affirm the deed and disaffirm the mortgage, the two instruments constituting but one transaction. The same principle obtains in the purchase and mortgaging of chattels.[69]

30. As to the extent to which an infant must make restitution on disaffirming his contract, the cases are not harmonious. Upon this subject there have been stated the following propositions regarding voidable contracts: "If the contract has been wholly or partly performed (by the infant) but is wholly executory on the part of the other party, the minor having received no benefits from it, he may recover

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63 43 N. H. 413 (1861).
64 40 Neb. 195 (1894).
65 10 Pet. (U. S.) 58 (1836).
66 40 Neb. 195 (1894).
67 48 N. H. 251 (1869); 59 N. H. 354, 408 (1879).
68 12 Ch. Div. (Eng.) 675 (1879); 138 Mass. 310 (1885).
69 Am. & Eng. Encyc. Law (2d Ed.). Vol. 16, p. 293, citing 6 Me. 89 (1829); 159 Pa. 146 (1893); 16 Minn. 397 (1871).

back what he has paid or parted with; where the contract has been wholly or partly performed on both sides, the infant may always rescind, and recover back what he has paid, upon restoring what he has received; a minor, on arriving at full age, may avoid a conveyance of his real estate, without being required to place the grantee in *statu quo*, although a different rule has sometimes been adopted by courts of equity when the former infant has applied to them for aid in avoiding his deeds; where the contract has been wholly or partly performed on both sides, the infant, if he sues to recover back what he has paid, must always restore what he has received, in so far as he still retains it in specie."[70]

But suppose that the contract be free from all elements of fraud, unfairness, or overreaching, and the infant have enjoyed the benefits of it, but have spent or disposed of what he has received, or the benefits received be of such a nature that they cannot be restored; can the infant recover what he has paid? The English rule is that he cannot, and there are many decisions in the United States that support the English rule. But many other decisions, apparently thinking that the English rule does not sufficiently protect the infant, have modified, if they have not distinctly repudiated it, holding that although the contract was reasonable and the infant had enjoyed its benefits, yet, if he had wholly parted with or wasted what he had received, still he might recover what he had paid. Most of these last cases relate to real property, but the confusion has arisen from the difficulty of the problem before the courts; on the one hand, to protect the minor from youthful improvidence and inexperience, and on the other, to compel him to act with common honesty.[71]

31. The conclusion reached upon this class of cases, in the case just quoted from, is "that where the personal contract of an infant, beneficial to himself, has been wholly or partially executed on both sides, but the infant has disposed of what he has received, or the benefits recovered by him

[70] 56 Minn. 365 (1894), at p. 374 by Mitchell, J.

[71] 56 Minn. 365 (1894).

are such that they cannot be restored, he cannot recover back what he has paid, if the contract was a fair and reasonable one, and free from any fraud or bad faith on part of the other party, but that the burden is on the other party to prove that such was the character of the contract; that if the contract involved the element of actual fraud or bad faith, the infant may recover all he paid or parted with, but if the contract involved no such elements, and was otherwise reasonable and fair, except that what the infant paid was in excess of the value of what he received, his recovery should be limited to such excess."[72]

32. While a minor is not estopped to set up his infancy as a defense, in a common-law suit on his contract, by the fact that at the time of the execution of the contract he represented himself of age,[73] yet, a court of equity will not aid him in repudiating his contract brought about by his fraudulent conduct and misrepresentations.[74]

AFFIRMANCE OF VOIDABLE CONTRACTS

33. The **affirmance** of a **voidable contract** by the minor does not require a new consideration to support it, as the ratification relates back to the original transaction.[75] The affirmance cannot be made until the infant arrives at full age,[76] except in case of his death, when his personal representatives may act.[77]

34. Since the liability of an infant depends upon his acts done after becoming competent to give a binding assent, the nature and extent of his liability will depend on what he assents to, as ascertained from his words or relevant acts.[78]

By the Infants Relief Act, 1874,[79] in England, the subsequent ratifications of an infant's voidable contract cannot be enforced in an action at law. Statutes in some of the United

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[72] 56 Minn. 378 (1894) by Mitchell, J.
[73] 65 Minn. 191 (1896).
[74] 125 Mo. 474 (1894).
[75] 50 N. H. 128 (1870); 21 Mich. 304 (1870).
[76] 24 Cal. 195 (1864).
[77] 6 Ala. 544 (1844).
[78] 21 Mich. 204 (1870).
[79] 37, 38 Vict., c. 62.

States require that the ratification be in writing signed by the party to be charged.[80]

At common law, a direct promise to pay a debt contracted during infancy, expressed verbally, is sufficient. The authorities are not uniform as to whether acts alone, or acts coupled with an acknowledgment of the debt, are sufficient, but they harmonize upon the proposition that when language is relied on to show ratification, while it may be either oral or written and while it need follow no particular form, it must be voluntarily and understandingly used and must indicate an intention to pay the debt;[81] a mere acknowledgment thereof by the infant after becoming of age will not bind him.[82] The more carefully considered decisions hold that it is not necessary to a binding ratification that the party sought to be charged knew at the time the promise was made that he had a right to avoid the contract. All men are presumed to know the law. The defense of infancy is optional, and an express promise to pay is not the only method by which the defense may be precluded; any other act or declaration which satisfies the court that the contract duty is still binding and intended to be complied with, if voluntarily done, neutralizes the defense of infancy.[83]

35. The ratification of an infant's contract may also be implied from such affirmative acts as selling, mortgaging, or converting to his own use, after attaining majority, the property purchased or procured.[84] Retaining or enjoying the property purchased as owner after attaining majority, will, in the absence of dissent within reasonable time, operate as a complete ratification; so, also, if he remain in possession of lands leased to him. In the same manner a written agreement entered into by an infant for the performance of services is ratified and confirmed when the infant, after becoming of age, continues in the same employment under the same terms.[85]

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[80] 40 Me. 378 (1855).
[81] 9 Mass. 62 (1812).
[82] 17 Col. 506 (1892).
[83] 101 Ala. 658 (1893).
[84] 111 Ala. 178 (1895).
[85] 171 Mass. 492 (1898).

FRAUDULENT CONTRACTS

36. Infants are, in many cases, liable for torts committed by them, but they are not liable where the wrong is connected with contract, and the result of the judgment is to indirectly enforce the contract.[86] If the money grow out of contract relations and the real injury consist in the non-performance of the contract into which the party wronged has entered with an infant, the law will not permit the former to enforce the contract indirectly by counting on the infant's neglect to perform it or omission of duty under it as a tort. Upon this principle, it has been held that infancy is a good defense to an action on the case for false and deceitful warranty of a horse.[87] Fraudulent representations made by an infant to induce another to enter into a contract with him will not give the contract validity as against the infant.[88]

MARRIED WOMEN

37. At common law, the legal existence of the wife was merged in that of the husband, and, having no separate legal existence, she had no power to contract; her attempted contracts were absolutely void.[89]

The inconveniences and hardships of such a system called, at an early date, for special exceptions at law and special relief in equity. In all jurisdictions, the old rules were found oppressive and unjust, and almost everywhere changes by legislation have been made and are still being made.[90] In many of the United States, scarcely a session of the legislature closes without the passage of some new enabling act in behalf of married women. The subject is, therefore, most voluminous, and there is no satisfactory method of determining the law in any jurisdiction, except by consulting the statutes and the cases construing them.

So far, however, as the subject is capable of intelligible discussion, notwithstanding the disparity and confusion of legislation in the different jurisdictions, a somewhat detailed

[86] 108 Ind. 472 (1886).
[87] 19 Vt. 505 (1847).
[88] 54 N. Y. 249 (1873).
[89] Bish. Cont, p. 949.
[90] 1 Pars. Cont, p. 340.

treatment of the marriage relation, and the present capacity of married women to contract, is attempted under its appropriate title.[91] For the present, it is sufficient to state that, by the legislation in England and in many of the United States, the powers of married women to enter into binding contracts have been advanced almost to full capacity, some of the statutes purporting to enable a married woman to contract as if she were single.

INSANE PERSONS

38. Insanity is a condition due to disease of the brain expressed by impairment of feeling, thought, and volition.[92] At common law, the import of the term was *total deprivation* of sense; it was expressed by the words *non compos mentis*, and included both idiocy and lunacy. An *idiot* is one who has been without understanding or reasoning powers from his birth; a *lunatic* is one who has had understanding, but by disease, grief, or other accident, has lost the use of his reason.[93]

The earlier views upon insanity have been greatly modified and extended by the courts, and while it was once held that an insane person could do no legal or binding act, it may now be regarded as settled that the mere fact of insanity, without more, does not disable a party to bind himself by any act or contract; and it does not exonerate him from responsibility, either civil or criminal.[94]

The proof which is designed to invalidate a man's act by reason of his insanity must show that the disease is of such a nature, or of such severity, that the person is incapable of understanding what he is doing, or of exercising a rational judgment in relation to the subject;[95] and, in the case of a charge of a crime, that he was incapable of distinguishing between right and wrong in the particular case, or of controlling the impulses of his own mind.

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[91] See *The Law of Husband and Wife.*

[92] Hamilton's Legal Medicine, Vol. 2, p. 54; Am. Law Reg., Vol. 34, p. 251.

[93] 1 Black. Comm. 303, 304; see *The Law of Personal Rights.*

[94] 4 Coke (Eng.) 124 (1603).

[95] 45 N. H. 423 (1864).

39. Insanity may exist in various degrees—from the slight attacks, which are hardly to be distinguished from eccentricity, to uncontrollable madness. It may seem to affect all the operations of the mind, or it may exist only in reference to a single subject. In cases at the present day it is not a question as to whether or not the party was insane. The test of mental capacity is whether the party possessed sufficient mind to understand in a reasonable manner the nature and effect of the act in which he was engaged.[96]

CONTRACTS WHERE PARTY HAS NOT BEEN ADJUDGED A LUNATIC BY LAW

40. The early common-law doctrine that a man shall not be allowed to stultify himself by alleging his mental incompetency in avoidance of his contract is no longer fully accepted.[97] Since the *agreement of minds* is of the essence of a contract, and since it is obvious that those who have no mind cannot agree in mind with another, it follows that they cannot contract; and, if one have not made a contract, it is difficult to discover any sound reason which should prevent him from saying so when he is charged as a party to one.[98]

41. In England, it is laid down as law, that when a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it be executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.[99] In the United States, some of the decisions are not in harmony with this view. It has been held that, insanity being proved, it would not avail the other party to the contract to show that he was ignorant of the fact and practiced no imposition.[100]

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96 45 N. J. Eq. 413 (1889).
97 47 Ind. 1 (1874).
98 *Ibid.*, quoting 1 Pars. Cont., p. 383.
99 (1892) 1 Q. B. Div. (Eng.) 599.
100 144 Mass. 48 (1886).

While the question is not without difficulty, it is believed that the mere executory undertaking of a person of unsound mind is voidable on the part of the insane party contracting, who, on being restored to reason, may either avoid or confirm such contract.[101] Where, however, a contract has been made in good faith with an insane party for a full consideration, and executed by the other party without knowledge of the insanity or reason to suspect it, the contract will be sustained.[102] The liability of the lunatic in such cases is upheld, not on the ground of contract, but on the fact that the lunatic has received and enjoyed an actual benefit from the contract.[103] These cases stand on the maxim that "he who seeks equity must do equity."

42. The general rule both in equity and law is that the mere fact that one of the parties to a contract is insane, not having been found to be a lunatic by judicial proceedings, does not render the contract void, but at the most only voidable, and is no ground for setting it aside where the other party had no notice of the insanity, and derived no inequitable advantage from it, and where the parties cannot be placed in *statu quo*.[104]

43. Upon recovering his normal mental condition, it is the duty of an insane party to elect promptly, that is, within reasonable time, whether he will affirm or disaffirm, and, if he elect to do the latter, it is his duty to restore or offer to restore what he has received, so as to place the parties in *statu quo*.[105] He cannot affirm in part and reject in part.

The insanity of one contracting party does not give the other the right to avoid the contract.[106] The right to avoid is merely for the personal protection of the insane, and can be exercised only by the insane person, his guardian, or representatives. The contract is binding upon the party who is sound of mind, and his rights under it are not affected until it is avoided by the party entitled to disaffirm it.[107]

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101 1 Gray (Mass.) 434 (1854); 5 Whart. (Pa.) 371 (1839).
102 78 Pa. 407 (1875).
103 79 N. Y. 541 (1880); 94 Ind. 535 (1883).
104 54 Minn. 208 (1893).
105 67 Minn. 74 (1896).
106 163 Mass. 362 (1895).
107 4 Allen (Mass.) 336 (1862).

44. Contracts for Necessaries. — An admitted exception to the rule, which makes the contracts of the insane persons void or voidable, is where the contract was for necessaries, suitable to his station in life, supplied to the insane person in good faith.[108]

The word *necessaries*, as applied to the insane person himself, is not so limited in this construction as to include merely articles of the first necessity, but is held to include everything advantageous and proper for the insane person's condition,[109] including medical attendance, nursing, and care. Humanity and his right to his own property require that he should not be restrained or thwarted in his preference and fancied enjoyments more than is necessary for his own welfare.[110] Necessaries supplied to the lunatic's wife and family are also within this rule.[111]

The provision of necessaries must be made under such circumstances as would justify the court in implying an obligation to pay for them, that is, with the intention on the part of the person making provision to be repaid for so doing, and to constitute a debt against the lunatic's estate.[112]

Where an insane person is under guardianship or in the care of a committee, the duty of providing for the lunatic's maintenance rests on the guardian, keeping in view the condition of the lunatic's estate. But, if the guardian neglect to supply the lunatic with necessaries, a stranger may supply his pressing wants.[113]

CONTRACTS MADE AFTER INSANITY IS ADJUDGED BY LAW

45. After the fact of insanity has been established by the usual legal proceedings of an inquisition, and the affairs of the lunatic have been vested in a guardian or committee, the power of such insane person to contract is held, in one line of decisions, to be entirely gone, and, except in certain cases of necessaries, the lunatic will not be liable on such a

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108 39 N. J. Law 207 (1877); 5 B. & C. (Eng.) 170 (1826).
109 Buswell, Insanity, p. 289.
110 10 Allen (Mass.) 59 (1865).
111 L. R. 4 Q. B. Div. (Eng.) 661 (1879); 1 Ala. 259 (1840).
112 44 Ch. Div. (Eng.) 94 (1890).
113 98 Ala. 249 (1893).

contract.[114] Contracts, however, made by this class of persons before inquisition, but within the period overreached by the finding of the jury, are not utterly void, although the proceedings in lunacy are strong presumptive evidence of want of capacity.[115] The presumption, whether conclusive or only *prima facie*, includes all persons whether they have notice of the inquisition or not.[116]

By the English decisions, the finding of a person's insanity by inquisition is not conclusive in a collateral issue, it merely destroys the natural presumption in favor of sanity and casts the burden of proving the person's sanity on the party alleging it.[117]

The general rule being that sanity is to be presumed until the contrary is proved, by the English decisions and those that follow them in the United States, a deed made by an insane person will be voidable only and not void.[118] Generally, however, in those states where the conveyances of insane persons are declared void, or where the committee or guardian is vested with the lunatic's legal estate, conveyances, after inquisition, are generally regarded as void absolutely.[119]

LUCID INTERVALS

46. It is settled law that all acts done by an insane person during a lucid interval are to be treated as the acts of a person perfectly capable of contracting and managing his affairs.[120]

A **lucid interval** is not a mere cessation of violent madness, nor is it a perfect restoration to reason; but it is a restoration so far as to enable the lunatic to comprehend and to do the act with such reason, memory, and judgment, as to make it a legal act for which the lunatic may be held responsible.[121]

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114 102 Ga. 202 (1897); 14 Pick. (Mass.) 280 (1833).

115 116 N. Y. 67 (1889); 51 N. Y. 378 (1873); 31 Pa. 243 (1858).

116 44 W. Va. 450 (1898); 90 Pa. 196 (1879); 6 Wend. (N. Y.) 497 (1831).

117 11 Beav. (Eng.) 105 (1848); 39 N. J. Law 207 (1877).

118 Buswell, Insanity, Sec. 397, p. 397; 2 Beas. Ch. (N. J.) 161 (1860); 53 Me. 451 (1866).

119 6 Pa. 371 (1847).

120 9 Ves. Jr. (Eng.) 605 (1804); 14 Pa. 417 (1850).

121 2 Del. Ch. 260 (1861).

But while a contract entered into by a lunatic during a lucid interval is binding, the protection of the insane requires that the evidence adduced in support of a lucid interval be examined with jealous scrutiny, otherwise fraud and imposition might be practiced with impunity; and, since a lucid interval is in its nature temporary and uncertain, there can be no legal presumption of its continuance for a month, a day, or an hour.[122]

Confirmed derangement being shown, the burden is cast on the other party to show that at the time of the transaction in question there was a lucid interval, that is, an intermission of the derangement, a restoration of the lunatic to his faculties enabling him to comprehend intelligently the nature and character of the transaction in which he was engaged. The evidence must be addressed to the actual time of the transaction and must be clear and convincing that the act proceeded from the unaided volition of the party.[123]

MERE MENTAL WEAKNESS

47. Courts of law and equity, in endeavoring to protect those of unsound mind, attempt to draw a line between sanity and insanity, but it is impossible to distinguish between the varying degrees of intelligence of individuals.[124] "It would be impossible to carry on the business of the courts, if they undertook to interfere in every case in which a superior and more astute intellect obtained an advantage in a bargain over a dull or feeble mind."[125]

Mere weakness of mind is not in itself a sufficient ground to justify the interference of a court of equity by the rescission of a contract; but an entire absence of intellectual power, or great mental aberration, will be sufficient to warrant such rescission.[126] And mere weakness of mind will always constitute an important element in actual fraud.[127] Therefore, whatever be the cause of the mental weakness, whether it arise from permanent injury to the

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122 104 Ala. 642 (1894).
123 *Ibid.*
124 1 Pars. Cont., p. 387.
125 Bisph. Eq., p. 230.
126 *Ibid.*
127 6 Metc. (Mass.) 415 (1843).

mind, or temporary illness, or excessive old age, it will be enough to make the court scrutinize the contract with a jealous eye; and any unfairness or overreaching will be promptly redressed.[128]

Where there is great weakness in mind in a party to a contract, so that valuable property is transferred for a grossly inadequate consideration, and where influence has been acquired and abused, or confidence reposed and betrayed, a court of equity will afford relief.[129]

HABITUAL DRUNKARDS

48. An **habitual drunkard** is one who has the habit of indulging intemperately in intoxicating liquors so firmly fixed that he is incapable of controlling his appetite for the same.[130] In most of the states, the status of the habitual drunkard approximates closely to that of a lunatic. The proceedings by which their persons and property are placed under control of a guardian or committee are regulated, in the United States and in England, by statutes closely analogous to those respecting lunatics. In some jurisdictions, the proceedings as to lunatics and habitual drunkards are identical and regulated by the same law.[131]

As in the case of insanity, the general trend of the decisions is to the effect that, upon the finding by an inquisition that a person is an habitual drunkard, his capacity to contract ceases and all executory agreements made thereafter by him are void absolutely;[132] the finding by inquisition is conclusive as to his incapacity.[133] In some jurisdictions, however, the decisions do not go so far, holding that the inquisition is competent evidence as *prima facie* proof of incapacity, but not conclusive.[134]

While an habitual drunkard is incapacitated from dealing with his estate, he may, nevertheless, when sober, earn

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128 21 Md. 338 (1863).

129 7 H. L. Cas. (Eng.) 750 (1859); 14 Ves. Jr. (Eng.) 273 (1807); (1893) 1 Ch. (Eng.) 736; 94 U. S. 506 (1876).

130 35 Mich. 210 (1876); 18 Pa. 172 (1851); Bouv. Law Dict.

131 6 Pa. Dist. 588 (1897).

132 14 Barb. (N. Y.) 169 (1851); 31 Pa. 243 (1858).

133 80 Mo. 474 (1883); 34 Ind. 67 (1870).

134 51 N. J. Eq. 574 (1893).

money by his labor in a regular way as a mechanic and receive pay therefor, and his receipt will discharge the debt.[135] Mere intoxication, formerly, was no ground at all for avoiding a contract,[136] but the rule that prevails now is that the contract of an intoxicated person, not capable of forming a rational judgment on the subject-matter, is voidable, providing it be promptly disavowed and the consideration restored.[137] So, also, the contract may be ratified by the intoxicated party on his becoming sober.[138]

ALIENS

49. An **alien** is one who resides in one country, owing allegiance to another (foreign) country; an unnaturalized resident foreigner.[139] In England, an alien is one born out of the allegiance of the king; in the United States, one born out of the jurisdiction of that country, and who has not been naturalized under the constitution and laws.

Aliens, in a legal sense, are either *alien friends* or *alien enemies*. An **alien friend** is one whose country (that of his allegiance) is at peace with the country in which he resides; an **alien enemy** is one whose country is at war with the country in which he resides.

RIGHTS OF ALIEN FRIENDS AS TO CONTRACTS

50. An alien friend can ordinarily enter into contracts, engage in trade, purchase and sell personal property, and sue and be sued, in the same manner and to the same extent as if he were a citizen of the country where he resides.[140]

At common law, an alien may take real estate by purchase, that is, by act of the parties (by deed or grant), and he may take by devise; but he cannot hold the property against the state.[141] His title is good against all excepting the state.[142]

135 132 Pa. 134 (1890).
136 Co. Litt. 247 *a*.
137 Poll. Cont. (6th Ed.), p. 88; 2 Aik. (Vt.) 167 (1826).
138 L. R. 8 Ex. (Eng.) 132 (1873); 61 Mich. 384 (1886).
139 Black's Law Dict.; 2 Kent's Comm. (13th Ed.), p. 50.
140 4 Kent's Comm., p. 62; 3 Story (U. S.) 458 (1844); 51 Conn. 435 (1883); 4 Saw. (U. S.) 28 (1876).
141 1 Black. Comm. 372.
142 7 Cr. (U. S.) 603 (1813).

At common law, an alien cannot take property by operation of law, that is, by descent.[143]

In the United States, by statutes varying in liberality in the different states, the common-law disabilities of aliens, as to property rights, have been greatly modified. In most states, resident alien friends are placed on the same footing as natural-born citizens; in other states, the same liberal policy is pursued toward non-resident alien friends; while in others, these privileges are accorded with restrictions, and in some cases denied altogether. In some states, the statutes confer property rights on those aliens only who have declared their intention to become citizens, or who have resided for a certain time in the state.[144]

DISABILITIES OF ALIEN ENEMIES

51. A man is said to be an **alien enemy** when he owes a permanent allegiance to the adverse belligerent, and his hostility is commensurate in point of time with his country's quarrel. It is a well-settled doctrine of the law that there cannot exist at the same time a war for arms and a peace for commerce,[145] and it has been laid down as a necessary consequence that, without express permission of the state, all contracts with the enemy made during war are utterly void.[146]

The law of the nations, as judicially declared, prohibits all intercourse between citizens of two belligerents which is inconsistent with the state of war between their countries, and "this includes any act of voluntary submission to the enemy, or receiving his protection, as well as any act or contract which tends to increase his resources, and every kind of trading, or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery

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143 Am. & Eng. Encyc. Law (2d Ed.), Vol. 2, pp. 72, 73.

144 Am. & Eng. Encyc. Law (2d Ed.), Vol. 2, p. 76, citing 24 U. S. Stat at L. 476; Ala. Code (1886), p. 1,914; Civ. Code of Cal., Secs. 671, 672; Ark. Dig. of Stat. (1894), Secs. 246, 248.

145 Kent's Comm., p. 66.

146 Bish. Cont., Sec. 1,000; 1 Kent's Comm., p. 67; 100 Mass. 561 (1868).

of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy."[147]

INDIANS

52. The legal status of the Indian tribes residing within the territory of the United States is peculiar. An Indian tribe or nation is not a foreign state; it is perhaps more correctly denominated a "domestic dependent nation." Their relation to the United States resembles that of a ward to his guardian; they are indeed termed the *wards of the nation.*[148]

It is provided by the constitution that congress shall have power to regulate commerce with the Indian tribes,[149] and under this clause congress has absolute and exclusive control over all traffic and commercial intercourse with the Indians.[150] By the revised statutes of the United States, it is further provided that no agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him or any other person in consideration of services for said Indians, relative to their lands, or to any claims growing out of, or in reference to, annuities, instalments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed in writing before a judge of a court of record and a duplicate delivered to each party, and bear the approval of the secretary of the interior and the commissioner of Indian affairs indorsed upon it.[151]

Aside from statutory prohibitions there is nothing to prevent an Indian from binding himself according to the

147 100 Mass. 561 (1868).
148 5 Pet. (U. S.) 17 (1831).
149 Const. U. S., Art. I. Sec. 8.
150 3 Wall. (U. S.) 407 (1865).
151 Act of March 3, 1871, Vol. 16, c. 120, Sec. 3, p. 570, U. S. R. S., Sec. 2,103.

ordinary law of contracts;[152] unless it appear that such contract falls within the provisions of the above recited statute or some other statute rendering it illegal, it must be held valid and binding.[153] But parties dealing with Indians must at their peril take notice of public treaties and acts of congress.[154]

CONVICTS

53. At common law, convicted felons and outlaws could not sue, but remained liable to be sued, on a contract made by them during outlawry or conviction.[155] Upon conviction of felony, all the goods and chattels, including debts and choses in action, of the felon were forfeited to the crown.[156]

In England, by statute abolishing forfeiture for treason or felony, a **convict** is defined to be any person against whom judgment of death or of penal servitude shall have been pronounced upon any charge of treason or felony;[157] and it provided that no action at law or suit in equity for the recovery of any property, debt, or damage, shall be brought by any convict, and that every convict shall be incapable of alienating or charging any property, or of making any contract.[158]

The incident of civil death attended every attainer of treason or felony whereby the attainted person is disabled to bring any action, for he is accounted in law as civilly dead;[159] he was disabled from being a witness and could perform no legal function. While, however, a convicted felon could make no contract which he could enforce, it is not implied that he is incapable of contracting with those whose conscience binds them to fulfil their engagements. So, a person attainted could take lands by devise and purchase. He could be a grantor or a grantee after attainder and the grant would be good as against all persons except the king.[160]

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[152] 1 Wash. Ty. 325 (1871).
[153] 122 Ind. 541 (1889).
[154] 75 Fed. Rep. 789 (1896).
[155] Poll. Cont. (6th Ed.), p. 95.
[156] Leake Cont., p. 465; 4 B. & C. (Eng.) 138 (1825); 1 Dall. (Pa.) 86 (1784).
[157] 33, 34 Vict., c. 23, Sec. 6; L. R. 19 Ch. Div. (Eng.) 1 (1881).
[158] L. R. 3 Ex. D. (Eng.) 352 (1878).
[159] 53 Vt. 315 (1881); 110 N. Y. 317 (1888); Co. Litt. 133; 1 Black. Comm. 133.
[160] L. R. 1 C. P. 389 (1866).

54. The doctrine of civil death is seldom applied in the United States. In some states, it is judicially declared that a convict is neither civilly dead,[161] nor deprived of his right of property, and may enforce such right by suit when it is necessary to do so.[162] Under the codes of some other states, convicts sentenced to life imprisonment are deemed civilly dead, but in the case of convicts sentenced for a term of years, his civil rights are only suspended during the term of his imprisonment.[163]

CORPORATIONS

55. The powers of corporations to contract are considered in greater detail in another part of this Course. Only a brief statement of the governing principles is here given.[164]

POWER TO CONTRACT

56. A corporation, being the mere creature of law, possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.[165]

Except where otherwise provided in their charters, corporations stand under the same restraints as individuals, in the use of their property, the exercise of their powers, and the transaction of their business to the end of avoiding injury to others.[166]

Therefore, in regard to contracts, corporations possess (1) such power to contract as is expressly conferred by the charters; (2) by implication of law, without any affirmative expression to that effect in their charters or governing statutes, and in the absence of express prohibitions, they have the same power to make and take contracts, within the scope of the purposes of their creation that natural persons

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161 6 Johns. Ch. (N. Y.) 118 (1822); 53 Vt. 315 (1881).

162 18 R. I. 590 (1894); 1 Houst. (Del.) 143 (1855); 83 Ga. 549 (1889); 23 Fla. 478 (1887); 17 Ohio 260 (1848).

163 97 Mo. 322 (1889); 35 Cal. 396 (1868); 110 N. Y. 317 (1888).

164 See *The Law of Commercial Paper;* see *The Law of Corporations.*

165 4 Wheat. (U. S.) 518 (1819), by Chief Justice Marshall; 22 Conn. 1 (1852).

166 Thomp. Corp., Sec. 5,640.

have; (3) their power is restricted to the purposes for which the corporation has been created, and cannot be lawfully exercised by it for any other purpose.[167]

The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers (called *ultra vires*) are unlawful and void, and no action can be maintained upon them in the courts. This statement is based upon these reasons: (1) The obligation of every one contracting with a corporation to take notice of the legal limits of its powers; (2) the interest of the stockholders not to be subjected to risks that they have never undertaken; (3) and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law.[168]

EXECUTION OF CORPORATE CONTRACTS

57. The ancient rule of common law was that a corporation could act only by deed, or power in writing, under its corporate seal.[169] But the rule, opposed as it was to the demands of practical business, necessarily suffered important modifications at an early day in England.[170] The exceptions were at first limited to small matters of daily occurrence, such as the appointment of servants, the principle of these exceptions being "convenience amounting almost to necessity."[171] This principle has been extended by modern decisions so as to cover practically all contracts which can fairly be treated as necessary for the purposes for which the corporation exists, and, in the case of *trading* corporations, all contracts made in the ordinary course of business.[172]

58. In the United States, the ancient doctrine has not been recognized. In the leading case, the rule of law was

167 Thomp. Corp., Sec. 5,645.
168 139 U. S. 24 (1890).
169 1 Black. Comm. 475.
170 43 N. J. Law 325 (1881); 6 Ad. & El. (Eng.) 846 (1838).
171 Poll. Cont. (6th Ed.), p. 148; L. R. 1 Q. B. (Eng.) 620 (1866).
172 L. R. 3 C. P. (Eng.) 463 (1868).

laid down "that whenever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation, and all duties imposed on them by law and all benefits conferred at their request raise implied promises, for the enforcement of which an action may well lie."[173]

The prevailing rule in the United States is that, unless the charter require it, the acts of a corporation need not be evidenced by its corporate seal, except where a seal would be required in the case of individuals.[174] Contracts made on its behalf by authorized agents, though by parol, are express contracts, and, as in the case of individuals, the law will on ordinary grounds imply promises against it.[175] When, however, in its transactions a sealed instrument is, under the law, the requisite mode of contracting, its seal is necessary; and, if provided by the charter or statutes that certain acts of the corporation shall be executed under seal, this formality is necessary, since the corporations can only act in the manner prescribed by its act of incorporation. But mandatory provisions of this kind must be carefully distinguished from those that are merely directory or enabling.[176]

IMPLIED CONTRACTS

59. Since the modern doctrine is that a corporation acting through its authorized agents, in the absence of a charter restriction, is subject to the same contractual liabilities and implications as an individual, it follows that a common-law action of assumpsit will lie against the corporation upon an implied contract for goods received or services rendered;[177] but, as in the case of a natural person, the law will not imply a contract where the corporation had no power to make an express contract to the same effect.[178]

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[173] 7 Cr. (U. S.) 299 (1813), by Justice Story.

[174] Thomp. Corp., Sec. 5,045; 5 Pa. 339 (1847).

[175] 9 Paige (N. Y.) 496 (1842); 43 N. J. Law 325 (1881).

[176] 109 N. C. 401 (1891); 2 Cr. (U. S.) 127 (1804); 19 N. Y. 152 (1859); 94 U. S. 574 (1876).

[177] 28 N. Y. 379 (1863); 10 Mass. 397 (1813); 137 U. S. 98 (1890).

[178] 130 Mass. 391 (1881); 1 Hilt. (N. Y.) 562 (1858).

MUNICIPAL CORPORATIONS

60. A **municipal corporation,** strictly, is the incorporation of the inhabitants of a particular place or district by the government, thereby authorizing them, in their corporate capacity, to exercise certain specific powers of legislation and regulation with respect to their internal affairs.[179] In a broader sense, the term *municipal corporation* means any public corporation exercising local governmental powers.[180]

Generally, the power of a municipal corporation to make contracts is expressly conferred by the charter itself, or by general legislation of the state creating the same, subject to definite restrictions as to the manner in which such power shall be exercised. Unless specifically restricted, municipal corporations have power, similar to private corporations, to enter into such contracts as are incidental or essential to the purposes and objects of its corporate existence.[181]

The power to make contracts is not to be construed as authorizing the making of contracts of all descriptions, but only such as are necessary, usual, fit and proper to enable the municipal corporation to effect the purposes for which it was created; and only to the extent necessary to execute the special power and functions with which it is endowed by law is there an implied authority to contract obligations.[182]

AGENTS

61. The authority or power of agents to contract on behalf of their principals, and the binding effect of such contracts on the parties, comprise the subject of principal and agent, which is treated in another part of this Course. It may, however, be stated here, as a general rule, that where an agent is known as such and contracts on behalf of his principal, and within the limits of his authority, with a third party, the agent's acts are the acts of his principal, and the contract being that of the principal, he alone is entitled to the benefits thereof and is alone liable to the third party.

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[179] Dill. Mun. Corp., Sec. 20.
[180] Bouv. Law Dict.
[181] 14 N. Y. 356 (1856).
[182] Dill. Mun. Corp., Sec. 443.

PERSONS NOT PARTIES TO CONTRACTS

PRIVITY OF CONTRACT

62. The legal relation subsisting between the immediate parties to a contract is called **privity.** It is probably more clearly defined as the mutual relationship between the actual contracting parties in a contract, and either of them and a third person claiming under the contract, which results from the existence of the contract.[183]

No contract, express or implied, can come into existence unless the parties sustain contract relations.[184] A contract being an agreement between two or more persons by which they are bound by the obligation thereby created, the general rule is, that a person who is not a party to a contract, cannot be included in rights and liabilities which the contract creates, so as to enable him to sue or to be sued upon it. If, therefore, an obligation take the form of a promise from one particular person to another particular person, to confer a benefit on a third person, the legal relations of the third person are unaffected by the obligation; he is not a party to the contract and is not bound by the legal bond which is created by it, nor can his rights be affected by a breach of that legal bond.[185]

THE RULE IN ENGLAND

63. The rule stated above is the inflexible doctrine in England. A person not a party to a contract cannot acquire rights or incur liabilities therefrom; no one who is not one of the actual contracting parties can maintain an action upon a contract.[186] No exception, even as to parties nearly related to each other, is admitted in law; but in

183 Cent. Dict.

184 39 Mich. 345 (1878).

185 Ans. Cont. (8th Ed.), p. 275.

186 4 B. & Ad. (Eng.) 433 (1833); 1 Stra. (Eng.) 592 (1721).

equity, if a contract in form be with one person (A), though intended to secure a benefit to another person (B), the latter, it is held, is entitled to say that he has a beneficial right as *cestui que trust* under that contract, and, in a court of equity, he (B) could insist upon an enforcement of the contract.[187]

So, in England, the principle was first established, and repeatedly sanctioned, that "if one person makes a promise to another for the benefit of a third, that third may maintain an action upon it."[188] This has been regarded as a modification of the rule in England, but it is claimed it is enforceable only when the benefit to be conferred on the third person amounts to a declaration of trust, and not otherwise.[189]

THE RULE IN THE UNITED STATES

64. This forceful doctrine, as it obtains in England, is recognized and affirmed in some of the United States;[190] but, in Massachusetts, an exception is held to exist where one person receives from another money or property as a fund from which certain creditors of the depositor are to be paid, and, either expressly or by implication from his acceptance of the money, has promised to pay such creditor.[191] And, in Pennsylvania, there are cases in which the third person, although not a party to the contract, may be said to be a party to the consideration on which it rests.[192]

Following the trend of the English decisions in their adoption of the doctrine that "if one person makes a promise to another for the benefit of a third, that third may maintain an action upon it" (which, as before stated, is restricted in England to a declaration of trust), the courts in the United States accepted and adopted the English doctrine as it existed in its broad sense.[193] It has been called the *American doctrine*, and it rules in most of the states, with some variations as to the essentials of the third party, or stranger, who is to be

187 30 Ch. Div. (Eng.) 57 (1885); 21 Ont. (Can.) 248 (1891).
188 2 Lev. (Eng.) 210 (1689); 1 B. & P. (Eng.) 101 (*note c.*) (1797).
189 Ans. Cont. (8th Ed.), p. 284.
190 90 Mich. 178 (1893); 47 Vt. 528 (1875); 55 N. H. 249 (1875).
191 1 Gray (Mass.) 317 (1854); 150 Mass. 45 (1889).
192 6 Watts (Pa.) 182 (1837); 85 Pa. 235 (1877).
193 20 N. Y. 268 (1859).

deemed entitled to maintain an action only if the contract have been made for his benefit, and if he be the party *intended* to be benefited. The mere fact that he is *incidentally* benefited does not entitle him to maintain an action.[194]

In regard to contracts under seal, the law has always been that only those who were parties to them could sue upon them.[195] But in some states, where the tendency is to disregard the distinction between specialties and simple contracts, the earlier technical distinction has been abandoned and it is held that the same rule prevails whether the agreement be under seal or not.[196]

NOVATION

65. Novation is the substitution by mutual consent of a new obligation for an old one, usually by the substitution of a new debtor or of a new creditor; the old obligation is thereby extinguished.[197] The term is sometimes used for the substitution of a new obligation between the original parties, as the substitution of a bill of exchange for a right of action arising out of a contract of sale, though this is more commonly called *merger* or extinguishment. It is possible by one novation to extinguish several obligations.

ILLUSTRATION.—If A owe a debt to B, B to C, and C to D, and it is agreed that A shall pay D in satisfaction of all; this promise, if consented to by all parties, extinguishes all the other claims, even though not performed.

Novation is actually the case of a new contract formed and a former contract dissolved, the general principles of consideration applying to the whole transaction.[198]

SUBROGATION

66. The doctrine of **subrogation** is that when a person has been compelled to pay a debt which ought to have been paid by another, who was primarily liable, he is entitled to

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194 122 N. Y. 498 (1890); 135 N. Y. 280 (1892); 69 N. Y. 280 (1877).

195 6 B. & C. (Eng.) 718 (1827); 154 Mass. 337 (1891); 27 N. J. Eq. 650 (1876); 53 Minn. 446 (1893).

196 107 Ill. 540 (1883); 43 N. Y. 399 (1871).

197 Cent. Dict.

198 1 Pars. Cont. 219.

be substituted in the place of the creditor, succeeding to all the remedies which the creditor possessed against the original debtor.[199] Both debtors may have been equally liable to the creditor; but if, as between themselves, there be a superior obligation resting on one to pay the debt, the other, after paying it, may use the creditor's security to obtain reimbursement.[200] The doctrine does not depend on privity, nor is it confined to cases of strict suretyship. It is a mode which equity adopts to compel the ultimate discharge of the debt by him who in good conscience ought to pay it.[201]

Subrogation is purely a creature of equity independent of the rules of law.[202] It is not founded on contract, but is merely a remedy adopted by courts of equity to accomplish justice. But while subrogation is founded on principles of equity and benevolence, and may be decreed where no contract exists, yet it will not be decreed in favor of a mere volunteer, who without any duty, moral or otherwise, pays the debt of another. It will not arise in favor of a stranger, but only in favor of a party who, on some sort of compulsion, discharges a demand against a common debtor.[203] The doctrine of subrogation is applied in the law of suretyship, mortgages,[204] insurance, and in other connections.

ASSIGNMENT

ASSIGNMENT IN GENERAL

67. An **assignment** is a transfer, or grant, by one person to another of the whole of any property, real or personal, or of any interest therein.[205] In its most technical sense, an assignment is properly the transfer, or making over to another, of the right one has in an estate, usually an estate for life or years.[206] But, as applied in the law of contracts, the word has reference to the transfer of every sort

199 35 Pa. 111 (1860).
200 56 Pa. 76 (1867).
201 116 N. Y. 566 (1889).
202 Beach's Equity Juris., Sec. 797.
203 163 Pa. 609 (1894).
204 180 Pa. 522 (1897).
205 Bouv. Law Dict.; 2 Black. Comm. 326.
206 *Ibid.*; see *The Law of Property:* Personal Property, Assignment.

of property or interest in property whether in possession or in action.[207]

68. The party who makes the assignment is called the **assignor;** the party to whom the assignment is made is called the **assignee.**[208] The instrument by which the transfer is made is frequently called an **assignment;** but this is not technically correct. The word properly has reference to the transaction and not to the paper by which it is evidenced, and which may be a deed or simple contract, as the circumstances require.[209]

At common law, it was necessary that the property or interest assigned should have an actual or potential existence in possession at the time of assignment,[210] and where this was the case no important legal discussion arose. So far as the law of contracts is concerned, the most interesting questions relating to assignments have been in regard to *choses in action.*

69. Any right to property under a contract, either express or implied, which has not been reduced to possession, is a **chose in action,**[211] and is so called because it can be enforced against an adverse party only by action at law.[212]

By the ancient rules of the common law, all assignments of choses in action were forbidden on the ground that maintenance and litigation would be thereby encouraged; the only exception was in favor of the king.[213] Nominally, the same doctrine still obtains at law, but usage and legislation have deprived it of all force so that it has become a mere shadow. In equity, an assignment of a chose in action, after notice to the debtor, has always been held valid, such an assignment being regarded as a declaration of trust, and an authorization to the assignee to reduce the interest to possession.[214] In England, the earliest exception was by the law merchant

207 84 Tex. 107 (1892).
208 Bouv. Law Dict.
209 124 Ill. 32 (1888).
210 Bouv. Law Dict.; 15 M. & W. (Eng.) 110 (1846).
211 2 Black. Comm. 396; Pars. Cont., p. 223.
212 See *The Law of Property:* Incorporeal Personal Property.
213 Story Cont., Sec. 465.
214 Add. Cont. (9th Ed.), p. 203.

in favor of bills of exchange, which was afterwards extended by statute to promissory notes.[215]

To meet the demands of modern commercial and industrial life, the courts of law were compelled to accept the rule in equity and protect such assignments, so far as possible, under their forms of procedure, recognizing an equitable interest vested in the assignee and permitting him to bring an action in the name of the assignor and recover a judgment for his own use and benefit.[216] In many of the United States, an assignee is, by statute, enabled to sue in his own name,[217] but this last is a question purely of procedure and does not create any new right. In the absence of a statute, the common-law rule prevails and the assignee sues in the name of the assignor to his own use.[218]

ASSIGNABLE INTERESTS

70. It is the established rule that those causes of action which would survive and pass to the personal representatives of a decedent as assets are, in general, assignable, and those causes which do not so survive are not assignable.[219] This is the practical test generally used in determining the assignability of a chose in action.

Upon the assumption, therefore, "that the power to assign and to transmit to personal representatives are convertible propositions," it will generally be found that property or choses in action arising out of contract can be assigned.[220]

But the right of action for a mere personal tort cannot be assigned.[221] The rule of the common law was that actions for torts died with the person and could not be maintained by the personal representatives of the injured party or against those of the wrong doer.[222] Statutes have greatly enlarged the class of things in action which survive, and it

215 2 Lewis's Blackstone, 442, note 18; Stat. 3, 4 Anne, c. 9.

216 6 Cush. (Mass.) 282 (1850); 20 Pick. (Mass.) 15 (1838).

217 Am. & Eng. Encyc. Law (2d Ed.), Vol. 2, p. 1,097.

218 116 Mass. 534 (1875); 1 Dall. (Pa.) 289 (1788).

219 25 Fed. Rep. 786 (1885); 13 N. Y. 322 (1855); 18 Pa. 246 (1852).

220 13 N. Y. 322 (1855).

221 Bisph. Eq., p. 242.

222 19 N. Y. 464 (1859).

is now the rule that causes of action arising out of torts to property, real or personal, are assignable.[223]

Examples of the first class, which are held not assignable, are actions for damages for assault and battery, malicious prosecution, slander,[224] etc. Examples of the second class, which are assignable, are actions for the wrongful conversion of personal property,[225] injuries to real estate, action against common carriers for breach of duty in failing to deliver goods,[226] etc.

71. The same rule applies to cases growing out of fraud. If the fraud or false representations merely affect the personal relations of the parties, the cause of action arising thereon is not assignable; but, if the deceit be practiced in a transaction relating to the purchase or sale of real or personal property, so as to affect the property rights of the injured party, the right of action is assignable.[227] Even in equity, the transfer of a mere litigious right, such as the mere right to file a bill in chancery on the ground of fraud, will not be recognized. But where an assignment is made of subsisting substantial property, a merely incidental right to sue for fraud will pass by the assignment.[228]

72. Rights arising out of contract cannot be assigned if they involve a relation of personal confidence, such that the party, whose agreement conferred those rights, must have intended them to be exercised only by him in whom he actually confided.[229] Thus, for example, a publishing agreement between an author and publisher has been held personal to the individuals entering into it and not assignable without the author's consent.[230] If the contract be personal and the performance of the party himself be of the essence thereof, it neither devolves on his personal representatives, nor can it be assigned.[231]

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223 Pom. Civ. Rem., Sec. 147.
224 11 M. & W. (Eng.) 315, 625 (1843).
225 22 Cal. 139 (1863); 11 Iowa 49 (1860).
226 13 Mo. App. 263 (1883).
227 Pom. Civ. Rem., Sec. 150; 109 Cal. 662 (1895).
228 Bisph. Eq., p. 241.
229 Poll. Cont. (2d Am. Ed.), p. 425 (1891); 138 Ill. 43 (1891).
230 (1897) 1 Ch. Div. (Eng.) 21.
231 63 N. Y. 8 (1875).

73. Parties may prohibit the assignment of any contract and declare that neither personal representatives nor assignees shall succeed to any rights in virtue of it, or be bound by its obligations.[232] But where this has not been declared expressly, or by implication, contracts, other than such as are personal in their character, may be assigned.

The question, as affecting executory contracts, has been said to be one of construction, depending on the intention of the parties. If the service to be rendered or the condition to be performed be not necessarily personal and such as can only, with due regard to the intent of the parties and the rights of the adverse party, be rendered or performed by the original contracting party, and the latter have not disqualified himself from the performance of the contract, the mere fact that the individual representing and acting for him is the assignee will not constitute a cause for terminating the contract.[233]

74. At common law, property non-existing, but to be acquired at a future time, was not assignable. What an assignor had, he could dispose of; what he had not, although expecting to acquire it, he could make no title to because he had no title himself.[234] Hence, at law, the assignment of a thing which had no existence, either actual or potential, at the time of the execution of the deed, was altogether void.[235] Thus, where an assignment was made by a firm of all the fish that might be caught by the firm's ship on a certain voyage and the firm subsequently became bankrupt, it was held that the assignee could not maintain replevin to recover the fish from the firm's assignee in bankruptcy. There was a possibility that they might catch fish, but, in the opinion of the court, there was "no actual or potential possession of, or interest in, the fish" at the time of assignment.[236]

But, in equity, certain assignments of future interests have been upheld on the ground that the assignee is entitled to have immediate specific performance of the contract to

[232] 152 U. S. 634 (1893).
[233] 63 N. Y. 8 (1875).
[234] 10 H. L. Cas. (Eng.) 189 (1861).
[235] 163 Pa. 438 (1894).
[236] 108 Mass. 347 (1871).

assign as soon as the property comes into existence in the hands of the assignor.[237] The effect of this is that instantly upon the acquisition of the thing the assignor holds it in trust for the assignee.[238] The assignee, therefore, has an equitable title from the time of the assignment. The one condition necessary is that it shall answer the description in the assignment; in other words, that there shall be no uncertainty as to its identification.[239] Equity, therefore, will uphold assignments of future or contingent interests and expectancies and things resting in mere possibility, if fairly made, and not against public policy; not as a transfer operating in the present, for that can only be of a thing in existence, but as a present contract to take effect and attach as soon as the thing comes into existence.[240]

Future wages to be earned under a contract of employment actually existing may be assigned, although the contract may be indefinite as to time or amount.[241] It is generally held that there must be, at the time of the assignment, a subsisting employment, and an assignment of future wages by one who is not engaged in or under contract for the employment in which the wages are to be earned will not be sustained.[242] Such assignments, however, are valid in equity, where the consideration is meritorious, and rights of third parties do not intervene.[243]

75. Assignments of certain species of property are not recognized on the ground that it would be against public policy to permit the owners to part with the same, since reasons of state require that they should always remain for the benefit of those to whom they were originally given.[244] Thus, the salary or fees of a public officer, or judge, or the pay or half pay of an army officer, cannot be assigned. Emoluments of this sort are granted for the dignity of the state and for the decent support of those persons who are

237 Bisph. Eq., p. 236.
238 10 H. L. Cas. (Eng.) 189 (1861); 19 Wall. (U. S.) 544 (1873).
239 13 App. Cas. (Eng.) 523 (1888) at p. 533.
240 124 Pa. 455 (1889).
241 2 Gray (Mass.) 565 (1854).
242 116 Pa. 513 (1887).
243 80 Me. 367 (1888).
244 Bisph. Eq., p. 241.

engaged in the service of it.[245] The assignment of these salaries is forbidden not on the ground of private interests, but upon that of securing the efficiency of the public service by seeing to it that the funds provided for its maintenance are received by those who perform the work.[246]

By statute, all assignments of claims against the United States government are void, unless made after the allowance of the claim and the issuing of the warrant for the payment thereof.[247]

76. A chose in action cannot be assigned in part so as to give a right of action to the assignee without the debtor's consent.[248] Thus, "an order drawn on a particular fund for a part only does not amount to an assignment of that part, unless the drawee consent to the appropriation. A creditor shall not be permitted to split up a single cause of action into many actions without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract and to decline any legal or equitable assignments by which it may be broken into fragments."[249]

Bills of exchange, unless accepted, and checks drawn in the ordinary form do not, therefore, according to the great preponderance of authority, amount to an assignment of that part of the fund on which they are drawn, although there are decisions which qualify the rule.

The assignment, however, of a part only of a chose in action is valid in equity, and will be upheld by a chancellor in all cases where just and equitable results may be thereby accomplished, for the reason that the procedure in equity is adapted to determining and enforcing all the rights of the parties.[250] But it is not every partial assignment that a court of equity will enforce; there must be a distinct

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245 3 T. R. (Eng.) 681 (1790).
246 86 Tex. 303 (1893).
247 U. S. R. S., Sec. 3,477; 112 U. S. 733 (1884).
248 117 Pa. 365 (1887).
249 5 Wheat. (U. S.) 277 (1820) at p. 288, by Justice Story.
250 73 Me. 498 (1882); 142 Mass. 366 (1886); 112 U. S. 737 (1884).

appropriation of a part of the fund and the sum assigned be specifically payable out of it, or the assignment will be void for uncertainty.[251]

RIGHTS OF PARTIES

77. The general rule is that where an assignment is perfected the assignee stands exactly in the place of the assignor. He is entitled to all his remedies and takes subject to all the equities between the original parties.[252] Therefore, the legal relation of the assignor, the assignee, and the debtor must be considered.

78. Assignor.—If the assignment be made in good faith and for valuable consideration, the assignor loses altogether his control of the thing assigned, and the rights of the assignee will be upheld.[253] The assignor cannot control the assignee's right to sue, nor interfere with the thing assigned, to the prejudice of the rights of the assignee;[254] nor will his death, or release, or bankruptcy (in the absence of fraud) affect the assignment. A payment to him by his debtor, with notice of the assignment, will be of no avail against the claims of the assignee.[255]

79. Assignee.—The assignee of a chose in action, not negotiable, takes the thing assigned subject to all the rights, legal and equitable, which the original debtor had acquired in respect thereto,[256] prior to the assignment, or at the time when notice was given of it where there is an interval between the execution of the transfer and the notice.[257]

The exception to the rule in the case of negotiable instruments rests upon the law merchant, and is considered elsewhere; otherwise, the rule has been applied to all the various forms of obligation.[258] In the transmission of property from one person to another, the former owner can in reason transfer only what he himself has to part with.

While the assignee of a chose in action takes subject to all

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251 143 Ill. 506 (1892).
252 2 Johns. Ch. (N. Y.) 441 (1817); Story Cont., Sec. 474.
253 12 Mass. 206 (1815).
254 42 Me. 221 (1856).
255 113 U. S. 258 (1885).
256 1 Ves. Jr. (Eng.) 247 (1790); 22 N. Y. 535 (1860).
257 32 N. Y. 488 (1865).
258 See *The Law of Commercial Paper.*

the defenses of the obligor against the obligee, he does not take subject to secret equities of third persons.[259] He is not bound to inquire of the whole world to see if some one have not a latent equity which might be interfered with by his purchase.[260]

Since every grant of any right or interest carries with it an implied undertaking, on the part of the grantor, that the grant is intended to be beneficial and that he will do nothing to interrupt the enjoyment of the thing granted,[261] it follows, as a general rule, that the assignment of a chose in action implies a covenant that the assignor has done and will do nothing to prevent the assignee from collecting it.[262]

In the absence of a special agreement, according to most authorities, the extent of the assignor's liability to the assignee is that he engages that it is a genuine and binding obligation, but, if he have shown good faith and fully disclose to the assignee all the facts connected with the execution of the obligation, his responsibility is ended.[263]

80. The Debtor. — The assignee acquires the rights of the assignor immediately upon the assignment, but in order to hold the debtor liable he must give him notice of the assignment. Until he receives notice, the debtor is not liable to the assignee and may either pay the assignor, or set off against the claim all demands against the assignor acquired before notice of the assignment.[264] It is, therefore, of the utmost importance for the assignee, immediately upon receiving a transfer of the chose in action, to notify the party liable. Notice to the debtor is not necessary to vest the equitable title in the assignee, for the assignment without notice is valid between the parties thereto.[265] Notice of the assignment fixes the rights of the parties and protects the assignee, and payment thereafter by the debtor is no defense to an action by the assignee on demand.[266]

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259 98 Pa. 150 (1881); 98 Ill. 11 (1881); 1 Fed. Rep. 755 (1880).
260 147 Ill. 293 (1893).
261 4 Cush. (Mass.) 24 (1849).
262 7 Gray (Mass.) 566 (1856); 74 Wis. 474 (1889).
263 86 Ala. 132 (1888); 57 Pa. 482 (1868).
264 20 Pa. 190 (1852).
265 32 N. Y. 483 (1865); 10 Conn. 444 (1835)
266 55 Minn. 122 (1893).

No special form of notice is required, nor is it necessary, in the absence of a statute, that it be in writing,[267] provided that sufficient information be given the debtor to put him upon inquiry as to the rights of the assignee.[268]

Where two or more assignments of the same chose in action have been made by the same person to different assignees at different times, the assignee who first gives notice to the debtor obtains priority, although this assignment may have been subsequent in date to that of the other assignee.[269] In England, the well-settled doctrine is that the assignee who first gives notice to the debtor obtains priority,[270] and this doctrine has been approved by the supreme court of the United States[271] and followed in many of the states.[272] On the other hand, courts of other states have decided in favor of the assignee who is prior in point of time, whether he have notified the debtor or not.[273] The safer course is that, in order to protect the title of an equitable assignee as against a subsequent assignee, notice of the assignment should be given.

The assent of the debtor is not essential to the validity of the assignment, nor is any formal acceptance of the notice required.[274] The court, after notice to the debtor, will protect the rights of the assignee and will not permit any act by the debtor to prejudice his claim. If, however, the debtor after notice of the assignment specially promise to pay the debt, the debt will thenceforth be as much the property of the assignee to whom the promise is given, as if it originated in a consideration moving from the assignee and had been his from the outset,[275] and the assignee may maintain an action thereon in his own name,[276] the debtor, by his promise, giving the assignee a legal title in the place of what was, until the promise, only an equitable title.[277]

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267 18 Pa. 394 (1852).
268 8 Me. 17 (1831); 141 N. Y. 495 (1894).
269 35 U. S. App. 67 (1895).
270 3 Russ. (Eng.) 1 (1823).
271 17 How. (U. S.) 612 (1854).
272 79 Pa. 240 (1875).
273 20 W. Va. 497 (1882); 104 N. Y. 108 (1887); Bisph. Eq., Sec. 169.
274 51 N. H. 409 (1871).
275 5 Phila. 7 (1862).
276 3 Pick. (Mass.) 115 (1825); 40 W. Va. 729 (1895).
277 11 Me. 385 (1834).

FORM OF AN ASSIGNMENT

81. There is no prescribed form of words necessary to constitute a valid assignment of a chose in action.[278] The essentials are a sufficient consideration, an intent to make a present transfer, and communication of that intent to the debtor.[279] In equity, no particular form is necessary; any writing, or even act, which plainly makes an appropriation of the fund or property to a person, will be deemed an assignment.[280] The assignment must be unconditional and complete, the assignor retaining no further control of the fund.[281] To constitute an assignment, either in law or equity, there should be such an actual or constructive appropriation of the subject-matter assigned, as to confer a complete and present right upon the assignee, even where the circumstances do not admit of its present exercise.[282]

As a general rule, non-negotiable choses in action may be assigned by parol;[283] but, in some of the states, statutes require certain classes of assignments to be evidenced by writing.[284] Where there is no written assignment, it is a question of fact whether there were a *bona fide* transfer or not, which is to be inferred from the conduct and acts of the parties.[285]

Unless restricted by statute, the common-law rule prevails that a chose in action may be assigned by a delivery of the written evidence of title or right to the assignee.[286] An open book account may, however, be assigned without writing or delivery of a written statement of the claim assigned, provided only that the assignment be founded on a valid consideration between the parties.[287]

In regard to written assignments, as already stated, no attention is paid to mere matters of form; if the court can

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278 150 Ill. 161 (1894).
279 3 Phila. 328 (1859).
280 30 N. J. Eq. 171 (1878).
281 14 Wall. (U. S.) 69 (1871); 1 Barb. (N. Y.) 454 (1847).
282 15 Ind. 298 (1860), citing Lead. Cas. Eq., Vol. 2, Pt. 2, p. 233.
283 13 Mass. 304 (1816); 50 N. J. Eq. 201 (1892); 30 N. Y. 83 (1864).
284 33 Vt. 431 (1860); 56 Ala. 500 (1876); 57 N. H. 306 (1877).
285 77 Me. 571 (1885).
286 132 Mass. 277 (1881); 84 N. Y. 572 (1881).
287 83 N. Y. 318 (1881).

clearly discern the intention of the parties, it will give effect to it regardless of the method by which it is expressed,[288] and, if the intent of the parties be not clearly shown in the writing, it may be shown by extrinsic evidence.[289]

82. An order drawn for the whole of a particular fund, or for the payment of a particular sum of money, in the hands of the drawee, is generally regarded as an equitable assignment of that fund as between the drawer and payee,[290] and, after notice to the drawee, it is binding upon him also to the amount of the order.[291] No formal acceptance by the drawee, having notice of such assignment, is essential to the validity and protection of the rights of the assignee.[292]

Where the order is drawn either on a general fund, or on a particular fund, for a part only, it does not amount to an assignment of that part nor give a lien as against the drawee, unless he consent to the appropriation.[293] This rule has been already referred to in discussing partial assignments. In this connection, it may be said that a mere personal agreement or promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund, when received, is not an assignment of that fund even in equity.[294]

83. An equitable assignment of a chose in action, being an executory contract, must have a consideration to support it, without which equity would no more enforce it than the law would make the breach of it a subject of compensation.[295] This, however, is between the assignor and the assignee. The right of the assignee to maintain an action against the debtor is not affected by the fact that no consideration is paid for the assignment.[296] The debtor has no standing to question the validity of the assignment on this ground.[297]

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288 37 N. J. Eq. 123 (1883).
289 25 Iowa 336 (1868).
290 5 Wheat. (U. S.) 277 (1820).
291 120 U. S. 511 (1886).
292 51 N. H. 407, 409 (1871).
293 24 U. S. App. 413 (1894).
294 14 Wall. (U. S.) 69 (1871); 143 Ill. 506 (1892).
295 1 Pa. 445 (1845); 1 Mass. 117 (1804).
296 51 Barb. (N. Y.) 86 (1865).
297 4 Pick. (Mass.) 1 (1826); 33 Kans. 106 (1885).

JOINT AND SEVERAL CONTRACTS

84. Where two or more persons together assume the obligation of a contract, such a contract is (1) *joint;* (2) *several;* or (3) *joint and several.*

The first rule governing a contract, where there is more than one party on either side, is that it is to be construed as a joint right or obligation, unless it be made several by the terms of the contract.[298] If two, three, or more bind themselves in an obligation, by using the words "we bind ourselves," and say no more, the obligation shall be taken to be joint only, and not several.[299] This, however, is a rule of construction and not of law, and is adopted upon the presumption that parties only intend to assume a joint responsibility, unless they directly assume a several responsibility. If, therefore, there should be words implying a several right or liability, the contract will be so treated. When an obligation is undertaken by two or more persons, the general presumption of law is that it is a joint obligation.[300] Words of express joinder are not necessary for this purpose, and the presumption is strengthened where the promisors have undertaken to accomplish a single result, for in such cases the promisee evidently relies upon a joint performance.[301] On the other hand, it is claimed that there should be words of severance in order to create a several responsibility.

85. A **joint contract** is one in which the contractors are jointly bound to perform the promise or obligation therein contained, or entitled to receive the benefit of such promise or obligation.[302]

86. A **several contract** is one where two or more promisors assume separate obligations binding themselves each separately and individually to the promisee.

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[298] 1 Story Cont., Sec. 53.
[299] 1 Shep. Touch. 375.
[300] 53 N. J. Law 638 (1891).
[301] 15 U. S. App. 527 (1894).
[302] Bouv. Law Dict.

87. A **joint and several contract** is one in which the promisors bind themselves both collectively and individually to the promisee, and which may be enforced by a joint action against all or separate actions against each promisor.

88. Whether a contract be joint, several, or joint and several, is primarily a question of intention, since it is a cardinal rule of construction that contracts shall be interpreted so as, if possible, to carry out the intention of the parties.[303] If the terms employed be distinct and express, so as to leave no room for doubt, they must control the construction of the instrument; but, if the language be ambiguous, the contract must be considered as a whole, and, if the intention of the parties can be ascertained by reasonable inference, it must prevail over the literal interpretation of detached phrases or clauses.[304]

In written contracts, the words "we promise," "we agree," or "we promise to pay" create a joint obligation to be performed by all, and all are jointly liable for the whole undertaking.[305] Each is liable for the whole debt, and, if sued severally, must plead in abatement the non-joinder of his co-obligors. There is but one cause of action and a suit against one is a bar to proceeding against the other co-obligors.[306]

89. Generally, an instrument worded in the singular and executed by several persons is a joint and several obligation; for example, a promissory note in form, "I promise to pay," signed by two persons.[307] So, where the words are "we or either of us promise" or "we bind ourselves and each of us," the contract is regarded as joint and several and suit may be brought against all the promisors together or against any one separately.[308] The advantages of a joint and several obligation are such that it becomes important in drawing instruments to express this beyond a doubt in language that will stand the test of

303 106 Ind. 523 (1886).
304 27 Vt. 596 (1855).
305 2 La. 62 (1830); 1 Ga. 220 (1846).
306 13 M. & W. (Eng.) 493 (1844); 119 Mass. 361 (1876).
307 7 Mass. 58 (1810); 25 Ill. 292 (1861).
308 2 Day (Conn.) 442 (1807).

criticism. The words commonly used in bonds are such as these, "we do bind and oblige ourselves and each of us, our respective heirs, executors, and administrators, jointly and severally, firmly by these presents." [309]

The most common form of a purely several contract is the ordinary form of subscription agreement where a number of persons promise to pay the amount set opposite their respective signatures. The language of such agreements is usually such that no question as to their several character could arise; for example, "we whose names are here underwritten in consideration of, etc. . . . promise, covenant, and pledge each one for himself, individually and severally, that we will each one pay, or cause to be paid, such sums as are respectively annexed to each of our names." [310]

In a few cases where the words of the contract were ambiguous, the undertaking has been treated as a joint one. But, even in doubtful cases, the majority of the decisions, looking at the real intent of the parties, regard the contract of subscription as several,[311] and declare that a separate action against each subscriber for his individual subscription to be the proper remedy.[312]

90. The question whether the right under a contract is joint or otherwise is often difficult to determine. The nature, and especially the entireness of the consideration, is of great importance in determining whether the promise be joint or several; for, if it move from many persons jointly, the promise of repayment is joint; but, if from many persons, but from each severally, it is several.[313] The question is what is the real interest of the parties? They must be so connected as to show an identity of interest. If that be the case, it is a joint contract.[314] In parol contracts, the court is compelled to look closely into the circumstances of the case, the situation of the parties and their understanding of their

309 25 Cal. 520 (1864).

310 22 L. R. A. 80 note (1892); 7 Johns. (N. Y.) 113 (1810).

311 50 Fed. Rep. 764 (1892); 106 Ind. 523 (1886).

312 51 Minn. 499 (1892); 32 U. S. App. 32 (1895).

313 1 Pars. Cont. * pp. 19–21 and note.

314 80 Mich. 302 (1890); 34 Md. 204 (1870); 33 Ill. 189 (1864); 16 Vt. 355 (1844).

relations as manifested by their acts, in order to determine whether their interests and, therefore their contract, are to be regarded as joint or several.

91. At common law, in case of a joint contract, if one of the joint contractors died, an action at law could not be brought or prosecuted against his executors but against the surviving contractors only.[315] The rule was based on the conception of the joint liability as a single indivisible right. If the contract were several, or joint and several, the executor or administrator of one could be sued in a separate action. but not jointly with the survivors, because such personal representative was to be charged with respect to the goods of the decedent, and the others with respect to their own goods.

By a doctrine which prevailed in equity, if it could be proved that the parties intended to create a separate as well as a joint liability, the obligation would be enforceable against the representatives of the deceased obligor,[316] the omission being treated as a mistake against which equity would relieve.[317] In some cases, equity might even presume such an intention from the nature of the transaction; but, where the inference was repelled by the plain facts of the case, equity would not interfere.[318]

92. The codes of a number of the states contain special provision as to the method of suing joint contractors and their personal representatives.[319] In some, the distinction between joint and joint and several contracts is practically abolished. Where a contract is joint, the obligees thereunder can enforce their rights only by a joint suit; each having an interest in the entire claim and every part thereof; one cannot alone maintain an action for his share.[320]

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315 119 Mass. 361 (1876); 158 Pa. 616 (1893); 3 Den. (N. Y.) 61 (1846).
316 3 Pom. Eq. Juris., Sec. 1,301.
317 8 Wheat. (U. S.) 174, at p. 212 (1823).
318 15 Wall. (U. S.) 140 (1872).
319 1 Beach Cont., Sec. 689; Pom. Code Rem., Sec. 118; Kans. Gen. Stat. (1868), c. 21, Sec. 1-4; Ky. Code, Sec. 39; Iowa Code, Sec. 2,550; Mo. Stat., Vol. 1, p. 269, Sec. 1-4.
320 140 Mass. 549 (1886).

93. Where one or more of the obligors on a joint contract are compelled to pay the whole of it, they are entitled to recover from the others, not paying, the proportion of the debt which they ought to have paid.[321] This is an application of the equitable doctrine of contribution, and applies as well to cosureties as to original joint contractors, the liability resting, it is said, not on contract, but on the principle of justice that those having a common interest ought to share in the common burden.[322]

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[321] 18 Pa. 33 (1851); 6 M. & W. (Eng.) 153 (1840).

[322] 19 Vt. 59 (1846).

THE LAW OF CONTRACTS

(PART 3)

CONSIDERATION

ELEMENTS

DEFINITION

1. **The consideration of a contract** is that act or forbearance of the one party which is given in exchange for the promise of the other. In the legal sense of the word, the consideration of a contract is the *quid pro quo*, that which the party to whom a promise is made does or agrees to do in exchange for the promise. Thus, in a contract of insurance, the promise of the insurer is to pay a certain amount of money upon certain conditions; and the *consideration* on the part of the assured is his payment of the whole premium at the inception of the contract, or his payment of part then and his agreement to pay the rest at certain periods while it continues in force.[1]

2. Consideration has sometimes been described as the motive or reason for entering into a contract,[2] but there is a clear distinction between motive and consideration. An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is the consideration.[3] Nothing is consideration that is not agreed to as such by the parties.

"Consideration means not so much that one party is profited as that the other abandons some legal right in the present, or limits his legal freedom of action in the future,

[1] 120 U. S. 183, 197 (1886).
[2] 2 Black. Comm. 443.
[3] 14 Wall. (U. S.) 570 (1871); 10 Conn. 480 (1835).

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as an inducement for the act or promise of the first. It does not matter whether the party accepting the consideration has any actual benefit thereby or not; it is enough that he accepts it, and that the party giving it does thereby undertake some burden, or lose something which in contemplation of law may be of value."[4]

PARTIES

3. Generally, the reciprocal promises are the consideration for one another and together constitute the contract. The promises, therefore, must be mutual, a subject which will be discussed later.[5] We have already considered the common-law doctrine that a party seeking to enforce a contract must not be a stranger to the consideration, and the American doctrine which modifies the common-law rule.[6] It is also important to note that the benefit to be derived from the contract need not pass directly to the party to be bound. If the other party by agreement abandon a legal right at his request for the benefit of a third person, the promisor is bound thereby. Hence, an agreement to forbear from exercising the right to sue is sufficient consideration to support a promise to pay made by a third person.[7]

TIME

4. Considerations may be of the *past*, the *present*, or the *future*, or they may be of all three classes; that is to say, *continuous*.[8]

Where the consideration and the promise are performed simultaneously and the agreement is at once completed, the promise and the consideration are said to be *concurrent*. Where the consideration is itself a promise to do something hereafter, the consideration is said to be *executory*. Where the consideration consists of an act or forbearance wholly performed, it is said to be *executed*.

[4] Poll. Cont. (6th Ed.), 164; 5 Cr. (U. S.) 142 (1809).

[5] See *subtitles* Subject-Matter, Mutuality, *infra*.

[6] 20 N. Y. 269 (1859); see *subtitle* Privity *supra*.

[7] 1 P. & W. (Pa.) 383 (1830); 150 Pa. 346 (1892).

[8] 1 Pars. Cont. 469.

5. No one can compel another to accept a gratuitous and unrequested service. Unless there be an agreement, there is no contract. Hence, the mere past performance of an act will not, as a general rule, sustain a promise founded on it, unless the act were done on request.[9] A past consideration, therefore, is not sufficient to support a subsequent promise unless there were a request of the party, either express or implied, at the time of performing the consideration.[10] Where there is an express request, it will in all cases be sufficient to support the consideration. Where, however, a party has received and accepted the benefit of a past consideration of the character from which a promise is implied by law, the law will often imply both a previous request and a subsequent promise of repayment.[11]

This fiction has already been discussed in connection with the subject of implied contracts. The doctrine has this important limitation, namely, "an executed consideration will not support any other promise than that which the law implies; to pay on request."[12] No other express promise made after the consideration has been executed, and founded wholly on that consideration, will be enforced, if it differ from the mere promise to pay implied by the law.[13]

Where a part of the consideration is past and executed and a part is executory, the consideration is said to be a continuing one and is sufficient to support an entire promise founded on both.[14]

NECESSITY OF CONSIDERATION

6. "A consideration of some sort is so absolutely necessary to the formation of a contract that a *nudum pactum*, or agreement to do or pay anything on one side, without any compensation on the other, is totally void in law; and a man

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[9] 5 M. & W. (Eng.) 241 (1839); 67 Iowa 591 (1885).

[10] Williams's Notes to 1 Saund. 264, Ed. of 1871; 3 Metc. (Mass.) 155 (1841).

[11] 14 Johns. (N. Y.) 378 (1817); 24 N. H. 517 (1852).

[12] 5 S. & R. (Pa.) 358 (1819); 29 Conn. 1 (1860).

[13] 3 Ad. & Ell. N. S. (Eng.) 234 (1842); 1 Pear. (Pa.) 118 (1857); 53 Ala. 83 (1875).

[14] 15 Pick. (Mass.) 159 (1833); 20 Col. 148 (1894).

cannot be compelled to perform it.'"[15] This statement, however, must be taken in connection with what has already been said in reference to the history and form of contracts.[16]

The history of the doctrine of consideration is obscure. The formal contract of the common law, that is, the contract under seal, did not require a consideration; in fact, the solemnity of that form of obligation concluded the obligor from making a defense thereto. In the case of informal or simple contracts, the most that can be said here is that the idea of consideration grew up in connection with the action of assumpsit, *nudum pactum* losing its ancient meaning, namely, an agreement not made by specialty, and coming to mean what it does now, as explained above.[17] Hence, the familiar maxim, *ex nudo pacto non oritur actio*[18] (no cause of action arises from a bare promise).

SIMPLE CONTRACTS

7. A sufficient consideration is, therefore, essential to the validity of a simple contract, whether the same be written or verbal.[19] A gratuitous promise, no matter how binding it may be in honor and conscience, is not enforceable at law.[20] The reason for the rule is that words frequently pass in a hasty and inconsiderate manner from men, which if enforced would not only betray them into acts of imprudence but expose them to the artifices of fraud.[21] For example, a promise to pay money for a charitable purpose depends wholly on the good-will of the subscriber and will not be enforced at law,[22] unless the promisor definitely authorize an expenditure which is made in reliance on his promise.[23] So, a promise to pay more than is due is a *nudum pactum* and not enforceable.[24]

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15 2 Black. Comm. 445.

16 See *subtitles* History, Form of Contracts, *supra*.

17 See Poll. Cont. (4th Ed.), Note *e* Appendix; Holmes Lectures on the Common Law.

18 Bro. Leg. Max. 745.

19 2 Cr. C. C. (U. S.) 14 (1810); 4 Johns. (N. Y.) 235 (1809).

20 11 Ad. & Ell. (Eng.) 438 (1840).

21 Sm. Cont., pp. 168-169.

22 5 Pa. Dist. R. 739 (1896).

23 121 Mass. 528 (1877); 54 L. J. Ch. (Eng.) 811 (1885); 16 Am. L. Reg. N. S. 551 (1877); 33 Pa. 114 (1859).

24 3 McLean (U. S.) 330 (1844); 131 Pa. 638 (1890).

SPECIALTIES

8. It is a principle of the common law that a contract under seal requires no consideration to support it. The older writers explained this principle by saying that the seal "imported" a consideration, but this is not historical. "The Anglo-Saxons followed the rule which is common to most nations in the earlier stages of their growth, that agreements, whether mutual or unilateral, are not binding unless clothed with some customary or legal form."[25] A written instrument sealed and delivered had the force which belonged to the Roman *stipulatio* and precluded dispute. Such an instrument was technically a covenant, the seal and writing not constituting the contract, but precluding the obligor from denying his act and deed authenticated by his seal.[26]

It is not to be understood that a sealed instrument, without consideration, stands for all purposes on the same footing as an instrument for which value has passed, since it certainly may be attacked by those having superior equities which the grantor had no right to cut off. Moreover, equity will not enforce a contract unless supported by a consideration. It is essential to specific performance that the consideration should be valuable. A merely good consideration will not suffice; besides, the consideration must be actual; a constructive consideration such as that imported by a seal to a bond will not do.[27]

SUFFICIENCY OF CONSIDERATION

9. A simple contract requires a sufficient consideration to support it.[28] There must be something given in exchange, something that is mutual, or something which is the inducement to the contract, and it must be a thing which is lawful and competent in value to sustain the assumption.[29] Common-law writers divide considerations into two classes (1) *good*, and (2) *valuable*.[30]

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25 Hare Cont., p. 121, etc.
26 15 Mich. 94 (1866); see *The Law of Property:* Deeds, Covenant.
27 Bisph. Eq., p. 489; 182 Pa. 485 (1897).
28 24 N. H. 302 (1851).
29 2 Kent's Comm. 463.
30 2 Black. Comm. 444; 1 Pars. Cont. 431.

GOOD CONSIDERATION

10. A **good consideration** is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation, being founded on motives of generosity, prudence, and natural duty.[31]

While the consideration of blood, or natural love and affection, is sufficient in a deed against all persons but creditors and *bona fide* purchasers, it is not sufficient to support a simple executory contract.[32] A promise induced merely by natural love and affection is a voluntary gratuity not enforceable at law or in equity.[33] The consideration of natural love and affection is strictly limited to near relatives. This is usually held to include the relationship of husband and wife,[34] and parent and child,[35] but the rule does not extend to collateral relationship,[36] or mere affinity by marriage.[37]

VALUABLE CONSIDERATION

11. **Value.**—A **valuable consideration,** in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other.[38]

As will readily be seen, the second half of this definition is the more important. It makes little difference whether the party accepting the consideration be actually and intrinsically benefited or not, if he be content to accept it.[39]

ILLUSTRATION.—An uncle promised to pay his nephew $5,000 in consideration of the nephew agreeing to refrain from drinking liquor, using tobacco, swearing, and playing cards for money, until he should become twenty-one years of age. The nephew performed his part and his forbearance was a valuable consideration sufficient to sustain the contract.[40]

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[31] 2 Black. Comm. 297.
[32] 18 Johns. (N. Y.) 145 (1820).
[33] 43 Ill. 207 (1867).
[34] 41 Tex. 111 (1874).
[35] 142 Ill. 160 (1892).
[36] 1 Sandf. Ch. (N. Y.) 258 (1844).
[37] 9 Barb. (N. Y.) 219 (1850).
[38] L. R. 10 Ex. (Eng.) 153 (1875), by Lush, J., at p. 162; 34 N. J. Law 54 (1869).
[39] Poll. Cont., p. 167.
[40] 124 N. Y. 538 (1891); Poll. Cont., p. 167.

12. A sale or transfer of property is a valuable consideration.[41] Cases where money, stock, securities, or interests in real property, constitute the consideration of contract may be referred to indefinitely to illustrate this principle; and the same may be said of work and labor done or services performed.

The distinctive feature in every instance of valuable consideration is the abandonment of a legal right.[42] Thus, in the case of a sale, a sum of money is given up by one party who in turn receives from the other all his right and title to the thing sold. In the case of a lease, the landlord yields possession of the premises as a consideration for the payment of rent. A servant gives his time and labor as a consideration for his wages. The surrender by a parent to a third person of the privilege of naming a child is a sufficient consideration for a promise.[43]

13. Insufficiency. — The performance of an act which a party is under legal obligation to perform cannot constitute a consideration for a contract.[44] For example, a promise to reward a constable for arresting a criminal under a warrant which he was bound by law to execute is without consideration.[45] So, a prisoner's promise to pay a jailer for services which he was legally bound to render will not be enforced,[46] and the same principle applies to any agreement to reward a public officer for doing what it is his duty by law to do. "Once allow an officer," it has been said, "to contract for extra compensation for the discharge of his duty, and bribery would become the means by which alone the laws could be executed."[47] But this does not apply to services by public officers which they were under no legal obligation to render.[48]

The same rule applies in the case of private contracts.

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41 35 Vt. 140 (1862); 1 Bush (Ky.) 629 (1866); 21 Me. 484 (1842).

42 3 N. H. 82 (1824); 171 Pa. 284 (1895); 20 Me. 462 (1841).

43 165 Mass. 218 (1896); 92 Hun (N. Y.) 264 (1895).

44 116 N. Y. 40 (1889).

45 10 Pa. 39 (1848).

46 56 Ky. 396 (1856).

47 23 Mo. 72 (1856).

48 44 Vt. 170 (1872); 11 Ad. & Ell (Eng.) 856 (1840).

A promise made to induce a party to comply with the terms of a contract, and prevent him from violating the same when he is already legally bound to comply with its terms, is without consideration.[49]

14. A promise to pay a debt for which the promisor is already bound is not such a consideration as will support a contract.[50] It is also well settled that an agreement to forbear to sue upon a debt already due and payable, for no other consideration than the payment of part of the debt, is without legal consideration and cannot be availed of by the debtor either by way of contract or estoppel.[51]

Where the whole of a liquidated debt is due and payable, a part payment is not sufficient consideration to support a promise of the creditor to accept the same in satisfaction of the whole debt.[52] This rule was laid down by the English courts as early as 1602 and has been followed, both in England and the United States, in almost numberless instances, although the courts, in so ruling, have not hesitated to criticize and question its fairness, since a technical release and acquittance under seal in full satisfaction of the whole would, under like circumstances, be accepted as valid and binding.[53]

But, while the courts have continued to hold to this doctrine, they have been astute to seize upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or to extract from the circumstances of the case, if possible, a consideration for the new agreement and to substitute this in the place of the old.[54] Thus, although a liquidated money demand cannot be satisfied with a smaller sum, yet, if any other personal property be received in satisfaction, it will be good;[55] or if other security be given for the debt, or if the payment be made in advance or at a different place from that stipulated.[56]

If there be any benefit, or even the legal possibility of a

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[49] 33 Ala. 265 (1858); 61 Minn. 482 (1895).
[50] 25 Mo. App. 596 (1887).
[51] 107 Ind. 158 (1886); 121 Mass. 106 (1876).
[52] Pinnel's case, 5 Co. R. (Eng.) 117 (1602).
[53] L. R. 9 App. Cas. (Eng.) 605 (1884); 124 N. Y. 164 (1891).
[54] 124 N. Y. 164 (1891).
[55] 43 Conn. 455 (1876).
[56] 1 Wend. (N. Y.) 164 (1828).

benefit, to the creditor thrown in, that additional weight will turn the scale and render the consideration sufficient to support the agreement.

A voluntary restoration of property which the law would compel a party to restore is not a sufficient consideration to sustain a promise made by the owner to obtain possession of his goods.[57]

15. Marriage.—Marriage is not only a valuable consideration, but "there is no other consideration so much respected in the law."[58] It is a consideration of the highest value and from motives of the soundest policy is upheld with steady resolution. A legal contract and promise made in good faith to marry another must, therefore, like an actual marriage, be deemed to be a valuable consideration for the conveyance of an estate, and will justly entitle the grantee to hold it against subsequent purchasers or the creditors of the grantor.[59] Mutual promises, therefore, between a man and a woman to marry will sustain each other, and the party violating his or her promise is liable in an action for damages. In the same manner, a promise by one person to another to pay him or her a given sum in consideration of his or her marriage to a third person is valid;[60] nor is it necessary that the party with whom the marriage is to be made be designated specifically.[61] And a release from a contract to marry is a good consideration for a promise by the party accepting such release to pay for the same.[62]

16. Concurrent Promises.—Mutual concurrent promises are valuable considerations for each other.[63] Promise for promise is a valid consideration everywhere. Such contracts are frequently called *bilateral contracts* in contradistinction to *unilateral contracts*, where the promise of

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57 2 Cow. (N. Y.) 139 (1823); 170 Pa. 124 (1895).

58 Co. Litt. 9 *b*.

59 103 U. S. 22 (1880); 59 Pa. 190 (1868); 5 Allen (Mass.) 454 (1862).

60 11 Ired. (N. C.) 174 (1850); Add. (Pa.) 276 (1795).

61 1 Johns. Ch. (N. Y.) 261 (1814).

62 56 Wis. 156 (1882).

63 29 Ill. 145 (1862).

the one party is given in consideration of and only in the event of actual performance by the other.[64]

The most important rule to be observed in the case of concurrent promises is that there must be absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement.[65] In contracts where the promise of the one party is the consideration for the promise of the other, the promises must be concurrent and obligatory upon both at the same time.[66]

17. Compromises.—As the law is said to favor the settlement of disputes without litigation, the **compromise** of doubtful rights by the parties to the agreement of settlement will be sustained on the theory of mutual considerations moving from each to the other.[67] Where the parties deal with each other on terms of equality and hold no relations of trust toward each other, and each have opportunity of acquiring knowledge of the facts bearing on the question of the validity of their claims, the settlement ought not to be overthrown,[68] even if it should later appear that the party complaining of it had surrendered rights which the law would have sustained.[69]

Family compromises, if made in good faith, are especially favored.[70] But, a compromise to be binding must not be tainted with fraud;[71] and, if a party know his claim is wholly unfounded, but threaten to sue on the same for the purpose of extorting money, the contract of settlement is void.

Where two parties have mutual unsettled dealings, or are asserting in good faith debts or demands against each other, a release in full by the one is sufficient consideration to sustain the release on the part of the other.

18. Forbearance.—Examples of **forbearances** as considerations for contracts will readily suggest themselves. An

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[64] Add. Cont., p. 13 (9th Ed.); Pars. Cont., p. 448; 98 Mass. 596 (1868); 43 Minn. 11 (1890).

[65] 1 Pars. Cont. 449; 6 Col. 89 (1881); see *subtitle* Mutuality *infra*.

[66] 12 Johns. (N. Y.) 190 (1815).

[67] 1 Ves. (Eng.) 444 (1750); 6 Pa. 417 (1847); 32 Ch. Div. (Eng.) 266 (1886).

[68] 137 U. S. 78 (1890).

[69] 47 N. J. Law 265 (1885).

[70] Bisph. Eq., Sec. 189.

[71] 54 Vt. 182 (1881); 3 Ore. 139 (1869).

extension of time for the completion or performance of a contract is a valuable consideration, and after forbearing for a reasonable time an action will lie on the new promise.[72] Mutual promises for forbearances are valid considerations for each other.[73]

A promise to forbear for a reasonable time from bringing suit on a claim honestly believed to be legal is a valuable consideration to support a promise by the debtor himself,[74] or by a third party; and, where the promise is made by the third party, he need not be directly interested in the suit forborne; it is enough that the plaintiff yields his legal right to proceed. But there must be some one liable to be sued.[75] There must, in such a case, be a binding agreement to forbear; a mere informal indulgence on the part of the creditor will not do. The extension must be either for a *definite time* or a *reasonable time*.[76] Where no time is fixed, what would under the circumstances be a *reasonable time* will depend for its solution on the circumstances of the particular case.[77]

As in the case of a compromise, the forbearance of the claimant will not amount to a consideration if he knew his claim to be invalid and without foundation,[78] but if there be in fact a serious claim honestly made in the belief that the same is enforceable at law, the abandonment of that claim is a valuable consideration for a contract.[79]

MORAL OBLIGATION

19. A moral duty without any legal obligation is not a sufficient consideration to support a promise.[80] Under the influence of a dictum of Lord Mansfield, an opinion at one time prevailed that a mere moral obligation resting on the honor and conscience of the promisor was a sufficient consideration for an express promise.[81] But the supposed doctrine was completely overthrown in England by a

72 4 Wash. C. C. (U. S.) 148 (1821).
73 1 Pick. (Mass.) 443 (1823).
74 44 Ill. App. 582 (1892); 87 Tex. 578 (1895).
75 4 East (Eng.) 455 (1804); 1 Pars. Cont. 443.
76 55 N. Y. 235 (1873).
77 130 N. Y. 415 (1892).
78 5 Ore. 228 (1874).
79 32 Ch. Div. (Eng.) 266 (1886).
80 38 N. J. Law 383 (1876).
81 1 Cowp. (Eng.) 290 (1775).

decision where the law was laid down that a moral obligation resting only in conscience was not a valuable consideration. "Indeed, the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it."[82]

There is, however, an exception to the rule in the case where there was originally an obligation to pay the money or perform the duty, which would be enforceable except for the interference of some positive rule of law; that is, where there was an original right of action which has become inoperative. Cases of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are generally cited as illustrations of this rule. Express promises founded on such preexisting equitable obligations have been enforced.[83] But this exception does not extend to the case where the original obligation has been extinguished by a release. The obligation to pay a debt previously released is no more than a moral obligation and cannot support an assumpsit.[84]

Contrary to the almost universal trend of modern decisions, both in England and the United States, the courts of Pennsylvania have adhered to the doctrine that an existing moral duty not enforceable at law is a sufficient consideration for an express promise to perform that duty.[85]

ADEQUACY OF CONSIDERATION

20. It is a fundamental principle of the law that, if the consideration of a contract be real, the court will not inquire into its adequacy.[86] In other words, if a man want a thing, he is the judge of what he will give for it. The law does not undertake to make bargains for, or correct the false estimates of, individuals. Where a party to a contract gets all the consideration he bargained for, he cannot be heard to complain of inadequacy.[87] Thus, where a promissory note

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[82] 11 Ad. & Ell. (Eng.) 438 (1840), by Denman, C. J.

[83] 3 B. & P. (Eng.) 247 (1802), note; 3 Pick. (Mass.) 207 (1825).

[84] 21 Ont. App. Rep. 418 (1894).

[85] 167 Pa. 569 (1895); 140 Pa. 63 (1891).

[86] Ans. Cont. 70; 15 M. & W (Eng.) 657 (1846).

[87] 2 Raym., Ld. (Eng.) 1,164 (1804); 103 Ind. 520 (1885).

was given, for services rendered, in an amount greatly in excess of the real pecuniary value of the services, the contract was, nevertheless, held valid. If the party (said the court) chose to pay for the services rendered a much larger sum than they were worth, he had a right to do so.[88]

The same rule is applied in equity, where, ordinarily, inadequacy of consideration will be insufficient to set a bargain aside, or to justify a refusal to enforce its specific performance. Where, however, the inadequacy is so great as to "shock the conscience" (which is the phrase usually employed), the contract may be rescinded.[89] The relief granted in such cases is less on the ground of inadequacy than on the ground of fraud evidenced thereby.[90]

While courts of law will not refuse to enforce a contract on the ground of mere inadequacy of consideration, yet, where there is evidence of fraud or oppression, the fact of inadequacy may be regarded as evidence of fraud in connection with the other circumstances of the case.[91]

IMPOSSIBLE CONSIDERATIONS

21. Where a promise is physically *impossible of performance* at the time of the agreement, and is known to be so by the parties, it is obvious that there can be no expectation of performance. Such a promise is wholly insufficient to sustain a contract; and the same may be said of a contract impossible in law which the parties are supposed to know.[92]

We are not now concerned with impossibility of performance unknown to the parties at the time of the agreement or subsequently arising, and urged afterwards as an excuse for non-performance; that subject is considered hereinafter.[93] Our present inquiry is about impossible promises as considerations.

22. A clearly impossible act cannot be the consideration of a promise. Thus, a covenant in a charter party, executed

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88 64 N. Y. 596 (1876).
89 Bisph. Eq., Sec. 219.
90 27 U. S. App. 643 (1895).
91 65 Fed. Rep. 864 (1895).
92 3 Term (Eng.) 17 (1789); Leake Cont. (3d Ed.), p. 591.
93 See *subtitle* Performance *infra*.

on March 15th, that a ship should sail on or before February 12th (of the same year) was held wholly void.[94] Legal impossibility, deducible from the character of the promise, renders the promise ineffectual as a consideration. For example, no action was held to lie on a covenant by a man to pay a sum to himself and two others jointly. The covenant (said the court) was senseless.[95] So, also, a contract to marry, made at a time when both parties are already married, and known to be so by each other, is invalid.[96]

Where the impossibility is known to the promisor, but unknown to the promisee, he must be taken to promise absolutely.[97] The detriment to the promisee resulting from a reliance on the promise will support an action for damages for the breach; for example, where a married man promised to marry a single woman who did not know that he was married.[98] If the impossibility of performance be known to the promisee though not known to the promisor, the promise cannot be accepted by the promisee with the expectation that it will be carried out and therefore will not be binding.[99]

A promise is not deemed impossible and void merely because it is difficult or absurd.[100] To bring the case within the rule, it must appear that the thing to be done cannot by any means be accomplished, for if it be only improbable, or out of the power of the obligor, it is not in law deemed impossible.[101]

ILLEGAL CONSIDERATIONS

23. If any part of the entire consideration for a promise be *illegal*, the contract is void and gives rise to no right of action, whether the illegality consist in a violation of statute or common law.[102] This topic will be treated more fully in considering the validity of contracts.[103]

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94 4 East (Eng.) 477 (1804).
95 2 Ex. (Eng.) 593 (1848).
96 63 Ill. 99 (1872).
97 Leake Cont., p. 597.
98 106 Mass. 339 (1871).
99 Leake Cont., p. 597.
100 19 Wend. (N. Y.) 500 (1838).
101 20 Pick. (Mass.) 105 (1838).
102 11 Wheat. (U. S.) 258 (1826); 21 Vt. 184 (1849); L. R. 3 Q. B. Div. (Eng.) 549 (1878).
103 See *subtitle* Validity of Contracts *infra*.

PROOF OF CONSIDERATION

STATEMENT OF CONSIDERATION

24. In the case of a verbal contract, proof of the consideration must rest on oral evidence. Where, however, the contract is in writing, it is not imperative that the consideration be stated. Since a simple contract is equally valid whether written or oral, there would seem to be no reason to require the consideration to be stated in the instrument, unless there be a special provision of law to the contrary.[104] The general rule is that the consideration need not appear on the face of the instrument, but may be proved by parol or inferred from the terms of the agreement, except when required to be in writing by the statute of frauds,[105] which is considered in its appropriate place. It is sufficient to say here that in certain classes of contracts a written memorandum of the agreement is required, and the English courts, after an extended controversy, construed this to mean that, unless it may be gathered from the memorandum upon what consideration the promise is made, the statute will not be satisfied.[106] Later cases affirmed this rule[107] (known as the rule in Wain v. Warlters), but recent statutes have limited its effect.[108] In the United States, some courts have adopted the rule, but the majority have rejected it.

EVIDENCE OF CONSIDERATION

25. Generally, a statement in a contract that it is made for a valuable consideration is *prima facie* evidence of that fact,[109] and the burden of proof rests on the party who alleges the contrary.[110] At common law, the rule was, as we have seen, that the presence of a seal imported a consideration and was conclusive.[111]

104 79 Pa. 279 (1875); 12 Fed. Rep. 519 (1882).
105 29 Car. II, c. 3; see *subtitle* Validity of Contracts *infra*.
106 5 East (Eng.) 16 (1804); Chit. Cont., Vol. 1, p. 91.
107 Reed Fraud, c. 19.
108 Act of 19 & 20 Vict., c. 92, Sec. 3.
109 16 Me. 394 (1839).
110 47 Me. 470 (1859).
111 2 Mass. 159 (1806) see *subtitle* Form of Contracts *supra*.

Where the written contract does not express the whole agreement of the parties, as where it is merely a collateral undertaking, or where the contract is partly in writing and partly in an unwritten agreement, the true consideration may be shown;[112] and this also applies to cases where the consideration stated is merely a nominal one.[113] Where the full consideration purports to be stated on the face of a written contract, an attempt to qualify it is met by the familiar rule of evidence which excludes parol testimony when offered to contradict or vary the terms, provisions, and legal effect of a written instrument, and which was formerly strictly applied to the consideration.[114] The more recent decisions, however, do not strictly apply the rule where the consideration, as stated in the instrument, is not a material part of the agreement, and the consideration alleged to be the true one is not inconsistent therewith.[115]

26. The distinction usually taken is that where the consideration of a contract is merely a formal recital (of a sum of money, for instance), parol evidence may be given of the true agreement.[116] Where the contract is complete on its face and the consideration is a contractual stipulation, the ordinary rules of evidence will apply and the consideration expressed cannot be varied or contradicted.[117] Thus, by way of illustration, where the consideration was expressed to be in a sum of money, it was held that it could be shown to be in iron of a certain quality.[118] So, also, where a sum is mentioned, it may be shown that the true amount is greater.[119] But money may also be contracted for as the consideration in a written contract, and when the intention so to contract is disclosed by the written instrument, no other or additional consideration may be shown.[120]

Whenever the statement of the consideration leaves the

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112 L. R. 8 Ch. App. (Eng.) 756 (1873); 73 Hun (N. Y.) 310 (1893).
113 97 Ga. 408 (1896); 131 Mass. 115 (1881).
114 73 Hun (N. Y.) 310 (1893); 16 Wend. (N. Y.) 460 (1836); 9 Jurist (Eng.) 633 (1849).
115 50 Law Times Rep. (Eng.) 424 (1884).
116 141 Ind. 55 (1894).
117 54 Mo. App. 636 (1893).
118 16 Wend. (N. Y.) 460 (1836).
119 8 Conn. 304 (1830).
120 54 Mo. App. 636 (1893).

field of mere recital and enters into that of contract, as shown by the intention of the parties to be gathered from the instrument, it is no longer open to contradiction.[121] If the parties so will and intend, they certainly can make the consideration a part of the contract and affect it with special details and conditions which will bind them within the rules of evidence relating to contracts generally.

FAILURE OF CONSIDERATION

27. Want of consideration is original lack of any consideration whatever. Failure of consideration results from the worthlessness or insufficiency of a consideration originally apparently good.[122]

As already stated, a consideration of some sort is absolutely necessary to the formation of a contract;[123] therefore, total want of consideration renders the alleged contract null and void.[124] The decisions do not distinguish clearly between want of and failure of consideration, for the reason that the result in both cases is practically the same.

Where the consideration, apparently valuable at the time of entering into the agreement, turns out to be wholly false, or a mere nullity,[125] or where it may have been actually good but before performance by either party it wholly fails, then the reciprocal promise resting on the consideration is no longer obligatory.[126] If one of the parties have paid money for such consideration, he is entitled to recover it. Thus, where a promissory note is given in payment for a patent right, which turns out to be wholly invalid, the maker of the note will be relieved from payment.[127] And the same rule holds generally where the title to property purchased, whether real or personal, previously warranted proves wholly defective.[128]

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121 54 Mo. App. 636 (1893).
122 Cent. Dict.; 51 Cal. 138 (1881).
123 See *subtitle* Necessity of Consideration *supra*.
124 40 Ind. 1 (1872).
125 1 Pars. Cont., p. 463; 141 Pa. 184 (1891).
126 81 Mo. 68 (1883).
127 148 Mass. 352 (1889).
128 84 Ky. 528 (1886); 11 Conn. 432 (1836); see *The Law of Property:* Private Grants, Sales of Personal Property.

28. It is not so easy to determine the rights of the parties where the consideration fails in part only. If the diminution or failure be such as to take away all the value of the consideration, there could be no way of distinguishing it from a total failure, but if there be a substantial consideration left, it might still suffice to sustain the contract for so much.[129] If the consideration and the promise consist of several parts and a part of the consideration fail, that which remains may be apportioned if capable of division. But the injured party may have a claim for damages arising out of the partial failure.[130]

If an entire consideration for a promise be void, the promise is not binding; but, if the consideration be severable, and if one or more of several considerations which are the grounds of the promise be only frivolous and insufficient, but not illegal, and others are good and sufficient, then the consideration may be severed and those which are void disregarded, while those which are valid will sustain the promise.[131]

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[129] 1 Pars. Cont. 463; 30 Ga. 344 (1860); 4 A. & E. (Eng.) 5,991 (1836).

[130] See *subtitle* Performance *infra*.

[131] 4 Mich. 515 (1857).

SUBJECT-MATTER

29. The **subject-matter** of a contract is that which is treated of in the agreement of the parties. The term is properly applied to the mutual promises of the parties considered as a whole, and comprehends both the consideration and the promise supported thereby. But common usage has illogically applied the term *subject-matter* to that thing concerning which a promise is made.[1]

ILLUSTRATION.—A agrees to build a house for B for the sum of $5,000. Now the subject-matter of this contract is A's promise to build a house in consideration of B's promise to pay the price mentioned. But it is quite customary to describe the *house* as the subject-matter of the contract.

It is impossible to classify all the various subjects upon which a lawful contract may be made. Upon this line they have been distinguished and specialized to such an extent as to require a separate treatment as distinct legal topics, such as bailments, sales, exchange, negotiable instruments, insurance, landlord and tenant, guaranty, building agreements, master and servant, etc. Around each of these subjects has grown up a distinct body of law.[2]

SUFFICIENCY OF TERMS

CERTAINTY

30. A contract to be enforceable at law must be *certain* and *explicit in its terms* as to the subject-matter, and not vague and general.[3] Thus, in an action on a contract in which it was alleged that the defendant had promised the plaintiff "an interest" in a mine, the court said, "an interest is a most indefinite term, for any fraction of a unit would

[1] Am. & Eng. Encyc. Law (2d Ed.), Vol. 7, p. 114.

[2] See the different subjects mentioned under their appropriate titles.

[3] 5 Daly (N. Y.) 313 (1874).

satisfy it and, consequently, the amount of estate to be conveyed is unknown to the court, and being unknown to the court no decree could possibly be made passing title to it."[4] So, also, a promise to give the plaintiff "one hundred acres of land" without any statement as to its location, value, and without relation to any fact which could render it more certain, was held void.[5] A promise to give a person, in consideration of services, "as much as to any relation on earth" was held too indefinite to be enforced.[6]

The courts, however, very reluctantly reject an agreement, regularly and fairly made, as unintelligible or senseless. They will, if possible, give effect to the contract. If the meaning of the parties can be ascertained, either from the express terms of the instrument or by fair implication, the court will carry it into effect.[7] Thus, the words *more* or *less* have a popular signification. As applied to quantity, they are to be construed as qualifying a representation or statement of an absolute and definite amount; so that neither party can avoid it or set it aside by reason of any deficiency or surplus occasioned by no fraud or want of good faith, if there be a reasonable approximation to the quantity specifically named as the subject of the contract.[8] The word *about* is used in a similar sense.[9]

COMPLETENESS

31. A contract must be *complete in its terms.* Where some of the terms are left to future determination, there can be no enforceable contract until the terms are complete.[10] Where a party agreed to supply certain patented articles at such rates as may from time to time be mutually agreed upon, and no prices ever were agreed upon, there was no binding contract.[11]

It has been already stated that there must be an exchange of considerations to complete a contract; hence, every contract is dependent on the existence of the thing or

[4] 107 Cal. 504 (1895).
[5] 17 S. & R. (Pa.) 45 (1827).
[6] 34 Pa. 475 (1859).
[7] 21 N. J. Law 369 (1848).
[8] 1 Allen (Mass.) 546 (1861).
[9] 96 U. S. 168 (1877).
[10] 133 Pa. 532 (1890).
[11] 3 P. & L. Dig. of Dec. and Encyc. of Pa. L., Vol. 3, p. 4,005; 132 Pa. 301 (1890).

consideration which is the basis of the promise.[12] The existence, therefore, of the thing about which the contract is made is indispensable to a valid agreement. If the parties be mutually mistaken as to its existence, there is no contract.[13] For example, in a mining lease where there is an agreement to pay royalties on the ore mined, if it turn out that there is no ore, the subject of the contract fails and the royalty is not payable.[14]

CONDITIONS

32. It frequently happens that the promise or promises contained in an executory contract are made dependent on the happening of a certain event or contingency. In such a case, the contract is said to be *conditional*. Where a promise is subject to a condition, that condition may be a *condition precedent*, a *condition subsequent*, or a *dependent condition*.[15]

No precise words are necessary to constitute a condition, nor will any formal words be construed as a condition if this were not the intention of the parties, which is to be collected from the entire contract. But, if the contract, in plain and unambiguous language, make the observance of a certain requirement or the happening of an event the condition upon which the agreement is to take effect, the courts cannot and will not disregard their deliberate act.[16]

CONDITIONS PRECEDENT

33. A **condition precedent** calls for the performance of some act or the happening of some event, after the terms of the contract have been agreed upon, *before* the contract shall take effect.[17] Conditions precedent must be strictly, literally, and punctually performed, or a valid excuse for non-compliance shown, as where the performance was prevented by the act of the other party.[18] Failure to perform is a breach of the contract and precludes recovery thereon.[19]

12 See *subtitle* Consideration *supra*.
13 156 Mass. 305 (1892); 37 Mich. 380 (1877).
14 186 Pa. 648 (1898).
15 1 Saund. (Eng.) 320 (1681); Williams's Note (1846).
16 103 N. Y. 341 (1886).
17 49 Wis. 431 (1880).
18 2 Dall. (Pa.) 304 (1795); 2 Pet. (U. S.) 96 (1829).
19 12 Fed. Rep. 343 (1882); see *subtitles* Discharge of Contracts, by Breach, Failure of Performance *infra*.

CONDITIONS SUBSEQUENT

34. A **condition subsequent** is one which provides that, upon the happening of some event or contingency, the obligation of a contract shall cease or be discharged; for example, the common form of a bond, which literally is an acknowledgment of a debt due to the obligee, conditioned to be void on the performance of some act or the happening of some event, otherwise to remain in full force.[20]

Conditions subsequent occur more frequently in the conveyance of real estate than in ordinary contracts, and in this connection the rule has been laid down that a court will not readily lend its aid in the divesting of an estate for breach of a condition subsequent, it being a fundamental doctrine that equity does not assist the recovery of a penalty or forfeiture or anything in the nature of a forfeiture.[21] Hence, the language of an instrument will not be construed as creating a condition subsequent when any other reasonable construction can be given to it. A condition subsequent, therefore, must be clearly expressed, since it is the duty of the court to interpret them strictly in order to avoid a forfeiture.[22]

DEPENDENT CONDITIONS

35. In contracts containing mutual promises, it may be that the obligation of one promise is quite independent of the performance of the other,[23] or it may appear that the obligation of the one promise is conditional upon the due performance of the other, neither party being obliged to do the first act, but each bound to be able and ready to perform his own, and he who is able and ready to perform may sustain an action against him who is not.[24]

Conditions that are mutual in such a sense, that each is as a condition precedent to the other and depends on the other, are called **dependent conditions,** also, *concurrent*, or *mutual, conditions*.[25]

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[20] Leake Cont., p. 550.
[21] 4 Johns. Ch. (N. Y.) 415 (1820); 4 Gray (Mass.) 140 (1855).
[22] 55 Wis. 637 (1882).
[23] Leake Cont., p. 564.
[24] 14 Conn. 479 (1841).
[25] 105 Mass. 276 (1870).

36. Lord Mansfield divided covenants into three kinds: (1) Such as are called mutual and independent, where either party may recover damages from the other for the injuries he may have received by a breach of the covenants in his favor; and where it is no excuse for the defendant to allege a breach of the covenant on the part of the plaintiff; (2) covenants which are conditions and dependent, in which the performance of the one depends on the prior performance of another and, therefore, until this prior condition is performed, the other party is not liable to an action on his covenant; (3) covenants which are mutual conditions to be performed at the same time, and in these, if one party were ready and offered to perform his part, and the other neglected, or refused, to perform his, he who was ready and offered has fulfilled his engagement and may maintain an action for the default of the other, although it is not certain that the other is obliged to do the first act.[26] The third class mentioned corresponds to what are known now as *dependent*, or *concurrent, conditions*.

The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties. It has always been one of the most difficult questions in the law of contracts to distinguish between those cases where the promises or stipulations are dependent or independent.[27]

When upon consideration of the whole contract it appears that the one party relied on his remedy by action, and not on the performance of the condition by the other, such performance is not a condition precedent.[28] On the other hand, where it is clear that the intention was to rely on the performance of the condition and not on the remedy, the performance is a condition precedent. The question in every case is what did the parties intend by their agreement; the formal rules that have been suggested by various writers are only an aid in arriving at their intention.[29]

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[26] Doug. (Eng.) 690 (1781).
[27] 1 Pars. Cont. 528.
[28] 1 Beach Cont., p. 116, quoting 18 C. B. (Eng.) 561 (1856).
[29] See rules by Sergt. Williams, in note to Pordage v. Cole, 1 Saund. (Eng.) 320 (1607).

37. It has been laid down as a rule that to ascertain whether covenants are dependent or independent, the intention of the parties is to be sought rather in the order of time in which the acts are to be done than from the structure of the instrument.[30] In many cases the rule of construction is adopted that an agreement to pay by installments or at different times would make the covenants independent, since such an agreement manifests a willingness to rely on the covenants of the party for title or performance as the consideration for such payments; also, where the acts stipulated to be done are to be done at different times, the covenants are generally construed to be independent of each other.[31]

Whether or not a stipulation be dependent or independent must be ascertained from the contract and attending circumstances, the rule being that such covenants will be construed as dependent unless a contrary intention appear from the terms of the contract; any other conclusion might lead to manifest injustice.[32] The seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money without receiving an equivalent in return. Hence, when one party seeks to compel the other to fulfil his contract, he must tender performance of his part of the agreement,[33] and an averment to that effect is always made in declaring on contracts containing dependent undertakings, and that averment must be supported by proof.[34]

ILLUSTRATIONS.—The defendant agreed to manufacture certain articles of iron for a foundry company, and the company agreed to furnish the materials, necessary tools, and mill power; the court held the furnishing of the materials and mill power were a *condition precedent* to the defendant's liability to perform his agreement.[35]

A contract contained a provision that if default were made by the contractors in the performance of their work, the government should have the right to complete it at the contractor's cost; it was held to be a *condition subsequent*.[36]

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30 4 Wash. C. C. (U. S.) 714 (1827).
31 153 U. S. 564 (1893).
32 11 N. Y. 453 (1854); 5 S. Dak. 352 (1894).
33 1 Pet. (U. S.) 455 (1828).
34 84 Hun (N. Y.) 506 (1895).
35 21 Pick. (Mass.) 417 (1839).
36 8 Ct. of Cl. (U. S.) 501 (1872).

The owner of land agreed to sell the same and deliver a deed on a particular day when the purchase money was to be paid; it was held that the covenants to pay the price and to deliver the deed were *concurrent* and *dependent*.[37]

Two persons purchased a property encumbered by liens. Each entered into a separate agreement with the other to pay off one-half of these liens in two years, specifying what each was to pay. One party failed to pay a claim and by reason thereof the property was sold by the sheriff; it was held that the covenants were *independent* and the party in default was liable although the other party had not completed his payments.[38]

ENTIRE AND SEVERABLE CONTRACTS

38. It is frequently of importance to know whether a contract be *entire* or *severable*. The question depends largely on the intention of the parties, and as the decisions are based on the facts of each particular case, rather than on well-defined rules, they are far from harmonious.[39]

39. A contract is **entire** when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration are common to each other and interdependent.[40] Such contracts are also called *indivisible contracts* and are enforceable only as a whole. Thus, where there is a contract to pay a gross sum of money for a certain particular thing, it is entire and not apportionable.

40. A **severable contract** is one that is in its nature and purpose susceptible of division and apportionment, having two or more parts in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be.[41] Such a contract is also called a *divisible contract*, and an action may be maintained for a breach of it in one respect or for several breaches, while, in other respects, it remains intact.

In such a contract the consideration is not single and entire as to all its several provisions as a whole; until it is

[37] 2 Watts (Pa.) 132 (1833).
[38] 3 W. & S. (Pa.) 300 (1842).
[39] Ans. Cont.,* p. 291.
[40] 110 N. C. 251 (1892).
[41] *Ibid.*

performed it is capable of division and apportionment. Thus, though a number of things be brought together without fixing an entire price for the whole, but the price of each article is to be ascertained by a rate or measure as to the several articles, or, when the things being of different kinds, though a total price is named, a certain price is affixed to each thing, the contract in such case may be treated as a separate contract for each article, although they all be included in one instrument of conveyance or by one contract.[42]

41. It is not the divisible nature either of the consideration or the performance, but the apportionment or non-apportionment of the consideration to the items of performance that is generally applied as the test to determine whether a contract be severable or entire. Thus, it has been said that if the consideration be single, the contract is entire, whatever the number or variety of the items embraced in its subjects; but, if the consideration be apportioned expressly or impliedly to each of these items, the contract is severable.[43] The criterion is to be found in the question whether *the whole quantity*, all of the things as a whole, is of the *essence of the contract*. If it appear that the purpose was to take the whole or none, then the contract would be entire.[44]

The distinction between entire and severable contracts becomes of importance chiefly in cases arising upon breach of contract, a subject that will be discussed hereafter.[45] Incidentally, it may be said that for the breach of an *entire contract* only one action can be maintained;[46] as the contract is indivisible, so the cause of action is indivisible: and where the contract is *entire*, nothing short of full and substantial performance will entitle one party to demand performance by the other.[47] Where, however, there has been a substantial performance in good faith and the breach is

[42] 110 N. C. 251 (1892).
[43] 3 P. & L. Dig. of Dec. and Encyc. of Pa. Law, Vol. 3, p. 4,266; 66 Pa. 351 (1870); 115 U. S. 188 (1885).
[44] 149 Ill. 343 (1894); 22 Pick. (Mass.) 457 (1839).
[45] See *subtitles* Discharge of Contracts, By Breach.
[46] 54 Ohio St. 214 (1896).
[47] 171 Pa. 46 (1895); 6 N. H. 481 (1834).

only in minor and non-essential particulars, a recovery may be had for the price, deducting the damages caused by the breach.[48]

Where a contract is *severable*, recovery may generally be had for the items performed.[49] When a consideration is *divisible* and the price can be apportioned, then, if a distinct and divisible portion of the consideration fail, the price paid for such portion can be recovered;[50] and where a contract is *severable*, a recovery in one suit for a breach of one item does not preclude the injured party from bringing a second suit upon another breach.[51]

ALTERNATIVE PROMISES

42. An **alternative promise** is one in which the promisor agrees to do a thing in one of several ways at his own election, or at the election of the promisee. Thus, the promisor may say, "I will sell you one of this row of houses, whichever I *select*," or he may say, "I will sell you any one of these books, whichever *you* choose."[52]

Contracts which may be performed in the alternative are also called *optional contracts*. We have already had occasion to discuss *options* and some care is necessary to distinguish between the different uses of that word, which means a choice; it is sometimes applied to the choice between accepting and rejecting an offer, and again to what is really an optional contract, where for a consideration the privilege is given to a party of choosing between alternative promises.[53]

43. Where the election is merely as to the mode of performance conditioned on the convenience or capacity of the promisor, that is, where the obligation is in the alternative, as to do a thing upon one day or another, or in one way or another,[54] then the right of election is with the promisor, if there be nothing in the contract to control that presumption,[55]

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48 181 Pa. 530 (1897).
49 110 Pa. 236 (1885).
50 164 Pa. 570 (1894); 165 Ill. 544 (1897).
51 30 Pa. 202 (1858); 20 N. Y. Sup. 251 (1892).
52 Whart. Cont., Sec. 619.
53 See *subtitle* Options *supra;* 159 Pa. 142 (1893); 64 Minn. 27 (1896).
54 Whart. Cont., Sec. 619.
55 58 Wis. 390 (1883).

the general rule being, that the person who is to perform one of two things in the alternative has the right to elect.[56] Thus, a sale of goods at six or nine months' credit gives the election to the buyer either to pay at the end of six months or to take credit for nine.[57]

Where, however, from the whole contract, it appears that the promisee is to have the election, he must give notice of his election to the promisor as a condition precedent to charging him with the promise.[58] Thus, where there was a contract made to deliver a quantity of iron all in November, or equally in November, December, and January, at a higher price, it was held that the circumstances showed that the option was with the purchaser and that therefore he was bound to notify the seller in time for him to deliver according to whichever alternative was chosen, and that having failed to give notice of his choice the seller was discharged from performance.[59]

Where there is an agreement to pay either in specific articles or money on a given day, and the promisor fails to deliver the articles, the right of election is lost and the promisee's right to demand money is absolute.[60] An election when once made is final; the party making the election stands in the same position as if he had originally contracted to do the act which he has elected to do.[61] If a party by the terms of his contract be bound to make his choice within a given period, and that period elapse without exercising his right, he loses his right of election.[62] If one branch of the alternative to which he is bound become impossible, he is bound to perform the other.[63]

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[56] 1 Doug. (Eng.) 14 (1778).
[57] 5 Taunt. (Eng.) 338 (1814).
[58] Leake Cont., p. 587; 23 N. H. 471 (1851).
[59] L. R. 7 Q. B. Div. (Eng.) 92 (1881).
[60] 2 P. & W. (Pa.) 63, 301 (1830); 11 Vt 612 (1839).
[61] 1 E. & E. (Eng.) 354 (1859).
[62] 89 Fed. Rep. 174 (1898).
[63] 7 C. & P. (Eng.) 60 (1835).

THE LAW OF CONTRACTS

(PART 4)

VALIDITY OF CONTRACTS

MUTUALITY

1. The **mutuality of obligation** is the very essence of all contracts founded upon reciprocal promises.[1] "Hence it follows," says Pothier, "that nothing can be more contradictory to such an obligation than an entire liberty in either of the parties making the promise to perform it or not as he may please."[2] The parties to a contract, therefore, must both be bound, and the one is not bound unless the other is also.[3] If, therefore, the one party was never bound, on his part, to do the act which forms the consideration of the promise of the other, the agreement is void for want of mutuality. Without *reciprocity of obligation* there is no contract.[4]

ILLUSTRATION.—A contract to employ a person to work "from time to time," the services to continue "only as long as satisfactory" to the employer, and which provided for a forfeit if the servant quitted his employment without specified notice, was held void for want of mutuality. "We think," said the court, "that the parties of the first part were not bound, under the terms of the contract, to employ the party of the second part for a single day or hour, and if they had absolutely refused to employ him he was without remedy in any court of the country. Here the contract imposes no obligation on one of the parties, and hence it is void for want of mutuality."[5]

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[1] Add. Cont., p. 13; 10 Dist. Rep. (Pa.) 309 (1901).
[2] Poth. Obl. Pt. 1, Art. 4.
[3] 1 Whart. Cont., p. 5.
[4] 6 Ore. 405 (1877).
[5] 157 Ill. 339 (1895).

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So, too, a court of equity will not decree the specific performance of a contract which is lacking in mutuality.

ILLUSTRATION.—This principle is aptly explained in the so-called *reserve clause*, contained in the contracts of many of the professional athletic clubs with their players, which has several times been before the courts.[6] In one of the most recent of these cases a baseball club employed the player for six months under a contract which contained an option to renew for another period of six months, and for a similar period in two successive seasons, so that the player might be bound for four years at the option of the club, while the club might discharge the player on ten days' notice. It was held that this contract was wanting in mutuality and that an injunction to restrain the defendant from breaking his contract would be refused.[7]

2. We have already had occasion to consider the want of mutuality frequently apparent in optional unilateral contracts.[8] The courts are not inclined to look with favor on a unilateral contract when the party who is free is attempting to enforce it against the party who is bound. Thus, an agreement between two persons, by which one without doing anything to further the common enterprise is to share equally in the profits, is without mutuality and void.[9]

Cases often arise where the agreement is to consist of a contract on the one hand to sell and on the other hand to purchase, in which it is apparently within the power of the purchaser to fix the quantity that he will receive under the contract.[10] Some of the rules governing this class of contracts have already been considered in discussing options.[11]

It has been said that it is within legal competency for one to bind himself to furnish another with such supplies as may be needed during some *certain period* for some *certain business or manufacture*, or with such commodities as the purchaser has already bound himself to furnish another.[12] Reasonable foresight in business requires that such contracts, though more or less indefinite, should be upheld. Thus, a foundry

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[6] 9 N. Y. Supp. 779 (1890); 8 Pa. Co. Ct. 57 (1890).

[7] 10 Dist. Rep. (Pa.) 309 (1901).

[8] 28 N. J. Eq. 589 (1877); see *subtitle* Options *supra*.

[9] 4 Nev. 504 (1868).

[10] 34 U. S. App. 60 (1895).

[11] See *subtitle* Options *supra*.

[12] 105 Fed. Rep. 869 (1901); 110 Ill. 427 (1884); L. R. 9 C. P. (Eng.) 16 (1873).

may purchase all the coal needed for a season, or a hotel its necessary supply of ice.[13]

In all these cases, contracts looking toward the future and embodying a subject-matter necessarily indefinite in quantity have been upheld; but it will be observed that, although the quantity under contract is not measured by any certain standard, it is capable of an approximately accurate forecast. The capacity of the furnace, the needs of the railroad, or the requirements of the hotel are within certain limits ascertainable by the vendor. But an agreement by a wholesale dealer to supply a retailer during a certain stated time at stated prices so much of a commodity as the purchaser may require, which leaves it practically optional with the purchaser to give or refuse his orders with the rise and fall of prices, in effect binding the seller alone, and leaving the buyer in a situation to go on or discontinue purchasing as his interests develop, is unilateral and void for want of mutuality.[14]

REALITY OF CONSENT

3. Where there is an agreement between competent parties, the reality or genuineness of their consent may be affected by the circumstances of the transaction. Their apparent consent may be induced by ignorance as to a material fact of the agreement; or the freedom of consent may be affected by fear or by the consenting party being under the power of the influence of the other.[15]

Concerning reality or genuineness of consent, the inquiry recurs in various forms. All the other elements of a contract being valid ones, the question is: "Was the consent of both or either of the parties given under such circumstances as to make it no real expression of intention?" And the question may have to be answered in the affirmative where there is mistake, fraud or misrepresentation, duress, or undue influence, sufficiently operative to affect the contract.[16]

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13 20 La. Ann. 220 (1868).
14 105 Fed. Rep. 869 (1901).
15 Poll. Cont. (6th Ed.), p. 421.
16 Ans. Cont. (8th Ed.), p. 156.

MISTAKE

4. Mistake is occasioned by ignorance or misconception of some matter under the influence of which an act is done; so that the intention and legal consequence presumptively attributable to the act are rebutted or modified by evidence of the mistake.[17]

The validity of contract is not affected by mistake of itself. But mistake may be such as to prevent any real agreement being formed, in which case the agreement is void; or mistake may occur in the expression of a real agreement, in which case, subject to rules of evidence, the mistake can be rectified.[18] Mistake may be of law or in fact.

5. Mistake in Fact.—Where an act is done under a mistake, the mistake does not either add anything to or take away anything from the legal consequences of that act either as regards any right of other persons or any liability of the person doing it, nor does it produce any special consequence of its own, unless knowledge of something which the mistake prevents from being known, or an intention necessarily depending on such knowledge, be from the nature of the particular act a condition precedent to the arising of some right or duty under it.[19]

It may happen that each party meant something perhaps perfectly well understood, but not the same thing as the other meant. Here their minds have never met and, although the contract may appear a complete agreement, it is not a contract at all. In the leading case on this point, the plaintiff, an illiterate man, executed a deed which he was informed was a release for rent, when it was in fact a general release of all claims. It was held not the plaintiff's deed:[20]

6. Where it is material to the transaction to know who the other contracting party is and an error is made as to the person of the other party, there is no contract. For example,

[17] Leake Cont., p. 262.
[18] Poll. Cont. pp. 422, 423.
[19] Poll. Cont., p. 394.
[20] 2 Co. Rep. (Eng.) 9 *b* (1582).

if a man contract to purchase iron ore from a certain party, and a third person, without the knowledge or consent of the purchaser, deliver to him ore in fulfilment of the contract, there is no contractual relation with the third party.[21]

7. A contract entered into under a mutual mistake as to the subject-matter of the contract, which induces the contract, is inoperative. Such an error of fact takes place where some fact is supposed to exist which does not exist. Thus, where the owner of property leased to a manufacturer a water-power which both understood could be used for the manufacturing of pulp, and it turned out that the power could not be used for such a purpose, it was held that an error of fact had occurred which rendered the lease inoperative.[22]

8. If the parties in stating the terms of their agreement have made a mistake clearly apparent on the face of the instrument, and which admits of no other construction, it may be corrected either by a court of law or equity. The general rule is that the mistake to be relieved against must be mutual.[23]

A court of equity has no power to alter or reform an agreement made between parties, since this would be, in truth, a power to contract for them, but merely to correct the writing executed as evidence of the agreement so as to make it express what the parties actually agreed to. It follows, that the mistake which it may correct in such a writing must be, as usually expressed, the mistake of both parties to it;[24] that is, such a mistake in the drafting of the writing as makes it convey the intent or meaning of neither party to the contract.[25] If a court were to alter an instrument so as to make it accord with the understanding of one party when it already expressed the agreement as understood by the other, it would be just as far from expressing the mutual intent of the parties as before.[26]

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[21] 2 H. & N. (Eng.) 564 (1857).
[22] 65 Vt. 406 (1893); L. R. 2 Q. B. (Eng.) 580 (1867).
[23] 5 H. L. Cas. (Eng.) 40 (1854).
[24] 5 R. I. 130 (1858).
[25] 1 Pet. (U. S.) 1 (1828).
[26] 1 Ves. (Eng.) 317 (1749).

9. Mistake of Law. — The general rule of the common law is that a mistake of law is no ground for relief, a principle embodied in the maxim *ignorantia juris non excusat* (ignorance of the law is no excuse).[27] We have already had occasion to consider this maxim in discussing the rule that money paid by mistake of law cannot be recovered.[28]

It is obvious that some limit must be put to the excuse of ignorance of law by the citizens of a community if social order is to be maintained. And, as a general principle, the same rule is enforced in equity.[29] On the other hand, it would frequently lead to injustice if parties were always held strictly bound by acts done under a misapprehension of their legal rights.[30] It is by no means easy to reconcile these conflicting principles. The safest rule would seem to be that neither courts of law nor courts of equity will interfere to relieve against a pure mistake of law, stripped of all other circumstances. But courts of equity can and do interfere to relieve against mistakes of law,[31] although the reasons for such interference, as given in the decisions, can with difficulty be reduced to any common principles.

FRAUD AND MISREPRESENTATION

10. Properly speaking, a **representation** is a statement or assertion made by one party to another, before or at the time of the contract, of some matter or circumstances relating to it. It is not an integral part of the contract and consequently, except in certain special classes of cases (for example, policies of insurance), the contract is not broken, though the representation proves untrue; nor has such untruth any efficacy whatever unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth or by reason of its being made dishonestly with a reckless disregard as to whether it is true or untrue.[32]

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[27] 33 Am. L. Reg. & Rev., p. 366.
[28] See *subtitle*, Implied Contracts *supra*.
[29] L. R. 3 Ch. D. (Eng.) 351 (1875).
[30] L. R. 2 H. L. (Eng.) 170 (1867).
[31] 8 Wheat. (U. S.) 174 (1823); 1 Pet. (U. S.) 1 (1828).
[32] 3 B. & S. (Eng.) 751 (1863).

There are certain special classes of contracts which are affected by a mere misrepresentation; these are sometimes called contracts of most perfect good faith, all having this common characteristic, that peculiar knowledge of the subject-matter, or some part of it, is in the possession of one of the parties in such a manner that the other party must rely on his statements. Among these are contracts of marine and fire insurance, suretyship, sales of land, and partnership.[33]

11. A representation may amount to a **warranty,** an independent subsidiary promise collateral to the main object of the contract.[34] Where the representation is a part of the contract, so that, if untrue, the party to whom it is made is discharged from his obligation, it amounts to a **condition.**[35] For example, a stipulation in the charter party of a steamer that she is "now sailed, or is about to sail, from Benizaf, with cargo, for Philadelphia," was held a substantive part of the contract, a condition precedent, a breach of which justified a repudiation by the other party.[36]

12. Fraud is a false representation of fact made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it.[37]

At common law, fraud is said to vitiate all transactions; not only contracts but the most solemn acts, even judgments of the courts, may be set aside on this ground.[38] Hence, there are remedies for fraud both at law and in equity. The rule is universal that "whatever fraud creates justice will destroy."[39]

To entitle the complainant to relief, three things must concur: (1) That the defendant made some representation to the plaintiff meaning that he should act upon it; (2) that

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33 Hollingsw. Cont., p. 166; Ans. Cont. (8th Ed.), p. 192.

34 4 M. & W. (Eng.) 399 (1838); see *The Law of Property:* Sales of Personal Property.

35 Hollingsw. Cont., p. 163; 62 U. S. App. 538 (1898); 3 B. & S. (Eng.) 751 (1863).

36 113 U. S. 40 (1884).

37 Ans. Cont. (8th Ed.), p. 203.

38 6 Cal. 664 (1856).

39 29 N. J. Eq. 188 (1878).

such representation was false and that the defendant, when he made it, knew it to be false; (3) that the plaintiff, believing such representation to be true, acted upon it and was thereby injured.[40]

13. The Representation.—To constitute fraud there must be a false representation as to a material fact, and it makes no difference whether the representation be made by express words or by conduct, or whether it consist in a positive assertion of that which is false, or in the active concealment of something material to be known to the other party before entering into the agreement.[41]

Mere silence with regard to a material fact, which there is no legal obligation to divulge, will not avoid a contract, although it operate to the injury of the party from whom it is concealed.[42] An improper concealment of a material fact, which the party concealing is legally bound to disclose, and of which the other party has a right to insist that he shall be informed, is fraudulent; but mere silence as to anything which the other party might by proper diligence have discovered, and which is open to examination, is not fraudulent, unless a special trust or confidence exist between the parties.[43]

The representation must be as to a material fact susceptible of knowledge; a mere statement of opinion or conjecture will not amount to fraud.[44] The question whether the statement be merely an opinion or an express affirmance of personal knowledge depends upon the form of the statement and the character of the subject upon which it is made. From the circumstances it must be determined whether the party assumed or intended to convey the impression that he had actual knowledge.[45]

14. Knowledge of Falsity.—To constitute fraud, the false representation must be made with knowledge of its falsity, either knowingly without belief in its truth, or

[40] 34 N. J. Law 296 (1870).
[41] Poll. Cont. (6th Ed.), p. 535; L. R. 6 H. L. (Eng.) 377 (1873).
[42] L. R. 6 Q. B. (Eng.) 597 (1871), quoting Story Cont., p. 516.
[43] 2 Wheat. (U. S.) 178 (1817); 158 Pa. 263 (1893).
[44] 62 Minn. 146 (1895).
[45] 52 N. J. Law 77 (1889).

recklessly without caring whether it be true or false.[46] This is the rule where the action is brought for deceit.[47]

The same rule has been generally adopted where it is sought to rescind a contract on the ground of fraud; knowledge of the fraud must be proved.[48] The essential constituents of such an action are false representations made by a party knowing them to be such. The right to rescind at law does not arise unless the representation be false to the knowledge of the party,[49] or recklessly made without reasonable grounds for believing it true.[50] A representation, though false, which the party makes honestly, believing the same to be true, furnishes no ground for avoiding a contract at law, although other remedies may be available. So, it has been said, to maintain a defense to an action for the price of goods the same facts must be proved which would be necessary to maintain an action for deceit.[51] While this view is generally accepted it has not been universally adopted, some few states holding that proof of knowledge of the falsity of the representation is not material where there has been a positive misstatement.[52]

In equity the same test as to fraud has been upheld in important decisions, notably by the supreme court of the United States.[53] But there are decisions to the effect that material representations which are untrue, although innocently made,[54] or the concealment of facts by inadvertence, may in certain cases operate as a "surprise and imposition" and will induce a court of equity to decree a rescission.[55] Courts of equity grant affirmative relief by way of reformation or cancelation of instruments, and even defensive relief, in proceedings to enforce an obligation or liability, on the ground of constructive fraud such as would afford of no relief at law.

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46 L. R. 14 App. Cas. (Eng.) 337 (1889); 43 Fed. Rep. 123 (1890).
47 147 N. Y. 124 (1895).
48 126 Pa. 353 (1889).
49 92 Ky. 176 (1891).
50 11 N. Y. Supp. 220 (1890).
51 10 Allen (Mass.) 548 (1865).
52 75 Mich. 188 (1889); 47 Neb. 346 (1896); 37 Ind. 1 (1871); 137 Ind. 299 (1893).
53 158 U. S. 505 (1894).
54 1 Beach Mod. Eq. Jur.; Sec. 69.
55 55 N. J. Eq. 670 (1897); 46 N. J. Law 380 (1884).

15. As to what degree of recklessness in a representation will amount to fraud, it is said that generally, as a rule, a statement must be both false and fraudulent, but, if a person take upon himself to state as true that of which he is wholly ignorant or without reasonable grounds for believing it to be true, he will, if it be false, incur the same legal responsibility as if he had made the statement with knowledge of its falsity.[56] In England, however, a famous case has settled the law, for that jurisdiction at least, that the test as to whether a false statement is fraudulent or not does not depend upon whether or not there were reasonable grounds for belief. A false statement, made through carelessness and without reasonable grounds for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person making it liable to an action of deceit.[57]

A party is affected by a false representation made by another while acting as his agent within the scope of his authority in the same manner as if he had made it himself.[58]

16. Reliance on the Representation.—It is also essential that the complaining party actually was deceived by the person of whom he complains, and acted on the latter's representations to his injury.[59] A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own carelessness. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser do not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations.[60] If, having eyes, he will not see the matters directly before them, where no concealment is made

[56] 150 U. S. 665 (1893); 111 U. S. 148 (1883); 125 Pa. 52 (1889); 172 Mass. 53 (1898); 105 Fed. Rep. 573 (1900).

[57] L. R. 14 App. Cas. (Eng.) 337 (1889).

[58] 152 Mass. 117 (1890); see *The Law of Principal and Agent.*

[59] 125 U. S. 247 (1887).

[60] 13 Wall. (U. S.) 379 (1871).

or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness and has been misled by overconfidence in the statements of another.

Where the means of information are at hand and equally open to the parties, the doctrine of *caveat emptor* applies and the purchaser must take the consequences of his indolence or credulity.[61] The law does not exact good faith from a seller in those vague commendations of his wares which are manifestly open to a difference of opinion and which do not imply untrue assertions concerning matters of direct observations.[62] This is regarded as mere trade talk, or puffing, and not misrepresentation amounting to fraud.[63]

But the application of the rule depends upon the circumstances under which the representations are made. It does not apply, for example, where the parties actually occupy relations of trust, such as that of trustee and *cestui que trust* or of principal and agent, or where there is an active abuse of confidence reposed in another.[64] When the parties deal at arm's length, the doctrine of *caveat emptor* applies, but the moment the vendor makes a false statement of fact, and its falsity is not palpable to the purchaser, he has an undoubted right to implicitly rely upon it.[65]

It is also necessary that the complaining party should have acted on the false representation. Thus, if it appear that the plaintiff after hearing the untruth altered his condition, but not in consequence of having heard it, having done so independently, no action will lie.[66] It is incumbent upon the complainant to show that he was influenced by and actually relied on the representation to his injury.[67] And, lastly, the fraudulent misrepresentation must result in damage to the complaining party. Fraud without damages furnishes no ground for action, nor is it a defense.[68]

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61 6 Cl. & Fin. (Eng.) 232 (1835).
62 46 Minn. 463 (1891); 148 Mass. 504 (1889); L. R. 2 Ch. App. (Eng.) 21 (1866).
63 61 Fed. Rep. 163 (1894).
64 161 Mass. 516 (1894); 168 Mass. 266 (1897).
65 4 N. Dak. 219 (1894).
66 116 U. S. 599 (1886); 30 Pa. 401 (1858).
67 6 S. Dak. 543 (1895).
68 83 Cal. 7 (1890).

17. Remedies. — The effect of fraud upon a contract is not to render it void absolutely, but to make it voidable at the election of the defrauded party.[69] The injured party, therefore, may (1) affirm the contract and sue for the damages occasioned by the fraud, (2) rescind the contract, return what he has received thereunder promptly, and refuse to pay for it; or, if he have already paid, bring an action to recover the amount.[70]

18. There is no doubt that a person purchasing a chattel or goods, concerning which the vendor makes a fraudulent misrepresentation, may, on finding out the fraud, retain the chattel or the goods and have his action to recover any damages he has sustained by reason of the fraud.[71]

When, however, a purchaser acquires knowledge that he has been defrauded he has, as stated above, an election of legal remedies; he may keep the property and sue for damages, or he may repudiate the contract and demand rescission. These remedies are not concurrent, but inconsistent, and the adoption of the one of necessity excludes the other. The rule is well settled that the party must, within reasonable time after knowledge of the fraud, make his election as to whether he will affirm the contract or offer to restore the property and demand a return of the consideration. If after knowledge of the facts which entitle him to rescind, he deal with the property as owner, it is evidence of acquiescence and affirmance of the contract.[72]

But before a purchaser is compelled to elect he must be aware of the facts which raise such an election. Delay will not defeat his right to relief, unless the fraud was known to him or ought to have been known by the use of due diligence. Acquiescence and waiver are always questions of fact; there can be neither without knowledge; current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual

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[69] 22 U. C. Q. B. 199 (1862); 46 N. Y. 533 (1871).

[70] Hollingsw. Cont., p. 183.

[71] L. R. 5 App. Cas. (Eng.) 317 (1880).

[72] 61 Fed. Rep. 163 (1894).

action, but he may not shut his eyes to what he might readily and ought to have known.[73]

When fully advised, the party must act with reasonable promptness and despatch. He cannot rest until the rights of third persons are affected. If he do so, he loses his right to rescind. The wrong doer is not in the same position to complain of want of promptitude in rescission as are innocent third parties, unless the defrauded party has misled him by such acts of ownership and acquiescence in the contract as would result in great hardship and render it inequitable to permit the contract to be rescinded. Where the party desires to rescind on the ground of mistake or fraud, he must, upon discovery of the facts, at once announce his purpose and adhere to it. He is not permitted to play fast and loose. Delay and vacillation are fatal to his right.[74]

19. As to what will constitute unreasonable delay, there has never been any fixed, certain period of time within which the defrauded party must move for rescission.[75] Such an inquiry must depend upon the facts of the particular case.

The election to rescind or not to rescind, when once made, is final and conclusive. A party who elects to rescind must do so *in toto*.[76] He must tender back whatever property or thing of value he received under the contract.[77] This accords with equity and justice and is of universal application, unless the other party, by some act or omission, has rendered it impossible for the party desiring to rescind to return the property or consideration received. The ordinary rule is as a prerequisite to invoking the action of a court for the purpose of setting aside a contract; the defrauded party must, so far as is reasonably within his power, place, or offer to place, the other party in the position he would have occupied if the contract had not been entered into.[78] The maxim that "he who seeks equity must do equity" applies here.[79]

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73 99 U. S. 578 (1878).
74 93 U. S. 55 (1876); 83 N. Y. 300 (1881).
75 72 Miss. 442 (1895); 99 Pa. 295 (1882).
76 47 Minn. 491 (1891); 151 N. Y. 230 (1896).
77 136 Ind. 368 (1893).
78 129 Mo. 208 (1895); 61 Fed. Rep. 54 (1894).
79 103 Mass. 382 (1869).

Where the defrauded party has not parted with the consideration, he may on rescinding return what he has received and set up the fraud as a defense to an action on the contract or to recover damages for its breach.[80] If he have parted with the consideration, he may bring an action of assumpsit to recover the money paid. And if he have parted with personal property he may, on the discovery of the fraud, rescind and bring replevin to recover his property.[81] Where the defrauded party elects to hold the property that he has received and sued for damages, the action, as already stated, is trespass on the case for deceit.

DURESS

20. We have already referred to the subject of **duress,** where money was paid under circumstances of compulsion, where the rule of law was found to be that to constitute the coercion or duress, which will be regarded as sufficient to make a payment involuntary, there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another from which the latter had no other means of immediate relief than by making the payment.[82] The foundation of the right of action in this class of cases rests not so much in the involuntary character of the payment as in the fact that the payment is regarded as made without any consideration.[83] A narrower doctrine prevailed at common law where a contract was sought to be rescinded on the ground of coercion. Duress at the common law was of two kinds, *duress of imprisonment* and *duress of threats* (*per minas*),[84] a distinction still generally preserved in the English courts.

21. Such duress consisted either in (1) the unlawful imprisonment of a party or the husband, wife, parent, or child of a party; (2) the imprisonment of such a party by

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80 79 Ala. 406 (1885); 77 Pa. 50 (1874); P. & L. Dig. of Dec., Vol. 3, p. 4,057.

81 156 Pa. 342 (1893); 58 Pa. 453 (1868).

82 See *subtitle* Implied Contracts *supra.*

83 95 U. S. 210 (1877).

84 Poll. Cont. (6th Ed.), p. 579.

the abuse of lawful process; (3) actual or threatened physical violence to such a party.[85] Under the influence of the equitable principles established by the courts of chancery, duress has assumed a more extended meaning and is frequently laid down as that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind and will of a person of ordinary firmness. The more recent decisions, particularly in the United States, will be found to show a marked tendency to extend the doctrine of duress to cases not within the narrow common-law rule.

22. Duress by Imprisonment. — To constitute duress, the general rule of the common law was that imprisonment under regular and formal legal process would not render invalid a contract made by the prisoner.[86] To constitute duress at law, the arrest must have been either illegal or an abuse of lawful process.[87] But the courts, in many states, have adopted the more reasonable rule that even if the imprisonment be under legal process in regular form, it is, nevertheless, unlawful as against one who procured it improperly for the purpose of obtaining the execution of a contract.[88] Imprisonment that is suffered through the execution of a threat, which was made for the purpose of forcing a guilty person to enter into a contract, may be lawful as against the authorities and the public, but unlawful as against the threatener when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime.[89]

23. Duress Per Minas. — **Duress per minas** at common law included only acts done through fear (1) of loss of life; (2) of loss of limb; (3) of mayhem; (4) of imprisonment;[90] and this is stated as the limit of the rule in England, although mitigated in practice by the application of the equitable doctrine of undue influence.[91]

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85 Hollingsw. Cont., p. 188; 7 Wall. (U. S.) 205 (1868).
86 Story Cont., Sec. 512.
87 62 Fed. Rep. 107 (1894).
88 34 Tex. 371 (1870); 53 Kan. 146 (1894).
89 155 Mass. 233 (1891), at p. 251.
90 2 Co. Inst. 483.
91 Poll. Cont. (6th Ed.), c. XII.

In the United States, the prevailing doctrine is far more extended. Certain decided cases deny that contracts procured by menace of a mere battery to the person, or of trespass to lands, or loss of goods, can be avoided on that account, as such threats, it is said, are not of a nature to overcome the will of a firm and prudent man; but many other decisions of high authority adopt a more liberal rule and hold that contracts procured by threats of battery to the person, or of destruction of property, may be avoided by proof of such facts because, in such a case, there is nothing but the form of a contract without the substance. Positive menace of battery to the person, or of trespass to lands, or of destruction of goods, may undoubtedly be, in many cases, sufficient to overcome the mind and will of a person entirely competent in all other respects to contract, and it is clear that a contract made under such circumstances is as utterly without the voluntary consent of the party menaced as if he were induced to sign it by actual violence; nor is the reason assigned for the more stringent rule that he should rely upon the law for redress satisfactory, as the law may not afford him anything like a sufficient and adequate compensation for the injury.[92]

24. Duress of Goods. — The common-law doctrine was that duress of goods alone would not avoid a contract,[93] but there are many cases which hold that where a sum of money had been paid to obtain possession of goods unlawfully withheld, it could be recovered in assumpsit.[94] This doctrine has been applied in some decisions, but the weight of authority in the United States is to the effect that detention of goods under certain circumstances may constitute duress.[95] In one case, the court said that "duress may be of either the person or the goods of the party, and duress of goods may exist when one is compelled to submit to an illegal action in order to obtain them from one who has them in possession but refuses to surrender them

[92] 16 Wall. (U. S.) 414 (1872).
[93] 3 M. & W. (Eng.) 633 (1838).
[94] 6 Exch. (Eng.) 345 (1851); see *subtitle* Implied Contracts *supra*.
[95] 79 Tex. 543 (1891); 35 Fla. 110 (1895).

unless the exaction is submitted to."[96] The rule seems to be generally accepted in cases of great difficulty and hardship, or necessity, or where the property is threatened with destruction.

A mere refusal to pay a debt or perform a contract is not duress, nor is the mere fact that a lawsuit is threatened duress, where there is no danger of injury or destruction of the property, and where there is an opportunity to try the question legally, but where the party yields merely to avoid litigation.[97] It is almost impossible to draw an exact line between those cases where the contract will or will not be regarded as voluntary, each depending somewhat upon its own peculiar facts. The ultimate fact to be determined is whether the party really had a choice, whether he had his freedom of exercising his will.[98]

As, in the case of fraud, a contract made under duress is generally regarded not as void but as voidable.[99] It may be disaffirmed by the injured party under similar circumstances, or expressly or impliedly ratified. It has been said, however, that a contract obtained by actual physical compulsion might be regarded as absolutely void on the ground that there was no consent at all; for example, if a party's hand were held and he was forcibly compelled to sign his name. But duress, like fraud, rarely becomes material except upon the footing that a contract has been made which the party wishes to avoid; and it is well settled that where the duress consists only of threats the contract is merely voidable.[100]

UNDUE INFLUENCE

25. Any influence brought to bear upon a person entering into an agreement, or consenting to a disposal of property, which, having regard to the age and capacity of the party, the nature of the transaction, and all the circumstances of the case, appears to have been such as to preclude

96 45 Mich. 569 (1881), by Cooley, J.
97 160 Pa. 24 (1894); 101 U. S. 465 (1879).
98 49 Minn. 564 (1892).
99 See *subtitle* Fraud *supra*.
100 145 Mass. 153 (1887); Poll. Cont. (6th Ed.), p. 576.

the exercise of free and deliberate judgment, is considered by courts of equity to be **undue influence** and is a ground for setting aside the act procured by its employment.[101]

A transaction which takes place under undue influence may be either in the nature of a gift or a contract. In either aspect it is regarded by courts of equity with a jealous eye, but the scrutiny is more severe in the case of gifts than in those of contracts.[102]

26. Where an antecedent fiduciary relation exists, a court of equity will presume confidence placed and influence exerted. Where there is no such fiduciary relation, the confidence and influence must be proved by extrinsic evidence.[103] But, once proved, the rules of equity are just as applicable in the one case as the other. The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed.[104]

No definition of what the law denominates undue influence can be given which will furnish a safe and reliable test for every case; each case must be decided on its own special facts. All that can be said in the way of formulating a general rule on this subject is that whatever destroys free agency and constrains the person whose act is brought in judgment to do what is against his will is undue influence. The extent, or degree, of the influence is immaterial, for the test always is: Was the influence, whether slight or powerful, sufficient to destroy freedom of the will so that the act in question was the result of the domination of the mind of another?[105]

27. Since a contract made under undue influence may, if injurious to the confiding party, be set aside, it becomes important to know what relations are to be regarded as of a confidential nature. There are many such relations, in some of which the contract is absolutely voidable at the option of the party who is presumed to be imposed upon, while, in

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101 Poll. Cont. (6th Ed.), p. 580.
102 Bisph. Eq., Sec. 231.
103 Pom. Eq. Jur., Sec. 951.
104 7 H. L. Cas. (Eng.) 750, 779 (1859).
105 33 N. J. Eq. 494 (1881); 132 Mass. 164 (1882).

others, the confidential relation is *prima facie* evidence of fraud which may be rebutted by showing the transaction to be fair and honest. The subject belongs properly to equity jurisprudence, but it may be well to mention some instances in which a presumption of undue influence arises, keeping in mind, however, the fundamental rule that the principle applies to all situations where relations of trust and confidence exist.

In equity, persons standing in certain relations to one another, such as parent and child, husband and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward, are subject to certain presumptions when transactions between them are brought in question;[106] and if a gift of contract made in favor of him who holds the position of influence be impeached by him who is subject to that influence, the courts of equity cast upon the former the burden of proving that the transaction was fairly conducted, as if between strangers, and that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperience overreached by him of more mature intelligence.[107]

28. The relation of trustee and *cestui que trust* is one of peculiar confidence. The law will discountenance all but the most open and satisfactory dealings between parties standing in the relation.[108] And the same is true of a guardian and his ward.

The rule in regard to solicitor and client is very strict. While attorneys are not wholly incapacitated to purchase from their clients, the rule is that the presumption is always against the validity of transactions of that character and the burden is on the attorney to remove that presumption by showing affirmatively the most perfect good faith, the absence of undue influence, a fair price, and knowledge, intention, and freedom of action on the part of the client, and also that he gave his client full information and disinterested advice.[109]

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106 9 Ves. Jr. (Eng.) 292 (1804).

107 L. R. 2 P. & D. (Eng.) 468 (1872); 147 Pa. 624 (1892).

108 52 Pa. 498 (1866); 39 N. J. Eq. 211 (1884).

109 130 Ill. 304 (1889); 82 Me. 495 (1890).

Numerous illustrations will be found in the reports of the application of this rule to other relations of confidence, such as doctor and patient,[110] clergyman and parishioner,[111] principal and agent, husband and wife,[112] discussion of which properly belongs to equity.[113] The decisions in the United States show a disposition to avoid the application of as strict a rule in the case of parent and child, but while not regarded with the same degree of suspicion as those between guardian and ward, they are nevertheless scrutinized for any evidence of unfairness.[114] Another most interesting class of cases arises out of the fiduciary position of the directors or promoters of stock companies.[115]

29. The right of setting aside a contract or transfer of property voidable on the ground of undue influence is analogous to the right of rescinding a transaction voidable on any other ground, as, for example, for fraud. An important qualification is, that no subsequent confirmation of the contract will be operative unless made free and clear from the influence which vitiated the original transaction.[116] The right to property acquired by such means cannot be confirmed, unless there be full knowledge of all the facts and the rights arising therefrom and absolute release from the undue influence by means of which the frauds were practiced.[117] The right to set aside a contract orginally voidable on the ground of undue influence may, however, be lost by express confirmation or by an unexplained delay of such length as to amount to proof of acquiescence.[118]

LEGALITY

30. A contract, strictly speaking, is an agreement enforceable at law. The agreement may be complete in every sense and yet its subject-matter may be such that

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110 4 M. & C. (Eng.) 269 (1838).
111 48 N. J. Eq. 607 (1891).
112 147 Pa. 624 (1892).
113 Bisph. Eq. (6th Ed.), Sec. 235.
114 12 Pet. (U. S.) 241 (1838); 193 Pa. 605 (1899).
115 (1892) L. R. 1 Ch. D. (Eng.) 822.
116 Poll. Cont. (6th Ed.), p. 618; 8 Ch. App. Cas. (Eng.) 881 (1873).
117 25 L. J. Chan. (Eng.) 753 (1856); 140 N. Y. 394 (1893).
118 54 Pa. 472 (1867).

the performance of it would either consist in doing a forbidden thing, or be so connected therewith as to form a substantive part of the transaction. Such agreements are said to be **illegal** and are not enforced by courts of law.[119] If a contract be fairly open to two constructions, by one of which it would be lawful and by the other unlawful, the former will be adopted, since a court will not readily declare an agreement void.[120] Where, however, an agreement is of such a nature that it cannot be carried into execution without reaching beyond the parties and exercising an injurious influence over the community at large, every one has an interest in its suppression and it will be pronounced void from a due regard to the public welfare.[121]

Any attempt to classify the various agreements that are declared illegal will be more or less arbitrary, since the nullity of the agreement is, in every case, a matter of law and the distinctions made between the various groups of illegal contracts arise largely from the reasons which determine the courts to declare them illegal upon their particular facts. In a single unlawful agreement there may be more than one element of illegality, yet the court, in giving judgment, may rest its argument on one of these elements alone.

A convenient division of unlawful agreements, made by one of the best authorities, is into contracts (*a*) *contrary to positive law;* (*b*) *contrary to morality*, recognized as such by law; and (*c*) *contrary to public policy.*[122]

AGREEMENTS CONTRARY TO POSITIVE LAW

31. In General. — The general rule is that where the promise or undertaking upon which a party relies is upon an unlawful consideration or to do an unlawful act the contract is void, and this whether the contract be illegal, as being against the rules of the common law or a particular statute.[123]

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119 Poll. Cont. (6th Ed.), pp. 1, 259, 260, citing L. R. 2 Ex. (Eng.) 236 (1867); 144 Ill. 422 (1893).

120 117 U. S. 567 (1886).

121 50 N. J. Eq. 761 (1893).

122 Poll. Cont. (6th Ed.), p. 261.

123 17 Mass. 258 (1821).

The law will not lend its aid to enforce a contract made in furtherance of an act that it has forbidden. The maxim, "no action arises on an immoral contract," applies in all such cases.

The simplest case is an agreement to commit a crime or indictable offense.[124] While this may seem unusual, there is an instance of a case in the eighteenth century of a highwayman filing a bill in equity against his fellow for a partnership account.[125] In the same manner, an agreement to commit a civil wrong is illegal; for example, a contract to indemnify the publisher of a libel, a contract to print a work in violation of another's copyright,[126] or a contract to indemnify another against the consequences of the commission of a trespass upon the person or property of another.[127] Also, in the same way, an agreement the object of which is to cheat and defraud either an individual or the public in general is illegal.[128] Thus, in an English case, an agreement between parties to purchase shares in a company, in order to induce the public to believe that there was a *bona fide* market for the shares at a real premium, was held an illegal transaction and no action could be maintained in respect of such an agreement.[129]

32. Arrangements and combinations among those expecting to become bidders at auctions or public sales, to prevent competition and bring about a sale below the fair market price of the thing sold, are condemned as immoral and against public policy and as tending to defraud the seller and all interested in the sale; the same rule applies to proposals for government work in response to advertisements for bids, with a view to awarding the contract to the lowest bidder, where there is a secret agreement by the contractors not to compete but to permit one of their number to obtain the contract without competition.

The converse is equally true. It is contrary to good faith

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124 23 Ark. 390 (1861).
125 Poll. Cont. (6th Ed.), p. 262.
126 3 Day (Conn.) 145 (1808).
127 17 Johns. (N. Y.) 142 (1819).
128 97 Mass. 482 (1867); 64 Conn. 101 (1894).
129 (1892) L. R. 2 Q. B. 724; 50 Minn. 255 (1892); 71 N. Y. 527 (1878); 60 N. J. Law 283 (1897); 190 Ill. 89 (1901).

and a fraud upon the real bidders for an owner to employ puffers to bid for him at auction, whereby the very condition of all auction sales—that the highest real bidder shall take the property—is broken.[130] A vendor at auction may employ bidders if he give notice of the fact at the sale.[131] But, if a sale be announced to be *without reserve* and a person be secretly employed to bid the property up, the sale is vitiated.[132]

An agreement by a combination of parties to put in one bid at a public sale is not necessarily void.[133] There must be some element beyond the mere fact of union before such an agreement can be condemned, as, in many instances, the strict enforcement of such a rule would tend to destroy competition rather than encourage it. The property may be too large and valuable to come within the means of an individual bidder; or it may be of such a description that no single investor might wish to encumber himself with it. In such a case, an honest combination of bidders might be not only unobjectionable but necessary to prevent a sacrifice of the property. Joint adventures are allowed; they are public and avowed, and not secret. The risk, as well as the profit, is joint and openly assumed.

This principle is applied in the case of contracts made for the purpose of defrauding creditors,[134] and the analogous cases of fraudulent breach of duty, such as in the case of dealings between a principal creditor and the debtor to the prejudice of a surety,[135] and settlements made in fraud of marital rights.[136]

33. Statutory Prohibition.—The general rule of law is, that a contract made in violation of a statute is void.[137] It is, however, a question of construction as to whether or not an act be forbidden by the statute, the true test being the intention of the legislative body that passed the law. The court

130 6 T. R. (Eng.) 642 (1796).
131 3 Story (U. S.) 611 (1845).
132 15 M. & W. (Eng.) 367 (1846).
133 16 How. (U. S.) 494 (1853); 43 N. Y. 147 (1870); 168 U. S. 471 (1897).
134 L. R. 15 Q. B. Div. (Eng.) 605 (1885)
135 L. R. 3 Q. B. Div. (Eng.) 495 (1877).
136 17 Am. Law Reg. N. S. 319.
137 145 U. S. 421 (1892).

will look to the language of the statute, the subject-matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment.

The following general principles are applied to prohibitory statutes: When a transaction is forbidden, it does not make any difference upon what grounds the prohibition is placed. There is no distinction as to the illegality of the contract between things *mala prohibita* (prohibited by law) and things *mala in se* (morally wrong), "for it is equally unfit that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited because it is against good morals, or whether it be prohibited because it is against the interest of the state."[138]

34. A statute may either expressly prohibit an act or it may impliedly prohibit it by affixing a penalty.[139] In the case of an implied prohibition, the generally accepted rule is that the imposition of a penalty on any specific act or omission is *prima facie* equivalent to an express prohibition.[140] There has been some fluctuation in the decisions applying this rule to specific statutes. While the statutory imposition of a penalty for doing an act implies a prohibition, nevertheless, if the court, from an examination of the statute, shall judge that it was not the intention of the legislature to make void all contracts entered into in contravention of its terms, the court will carry into effect the legislative intent.[141] When, however, the penal statute is silent, and contains nothing from which an intent to limit its consequences can be properly inferred, a contract in violation of it is void.[142]

The rules governing statutory prohibitions are not limited to legislative enactments, but include contracts violating constitutional provisions. In the United States courts, contracts have been declared void when made in contravention

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[138] Poll. Cont. (6th Ed.), p. 279, citing 5 B. & Ald. (Eng.) 335 (1822), by Best, J.; 2 Pet. (U. S.) 527 (1829); 93 Ala. 503 (1891).

[139] 114 Pa. 422 (1886); 1 Tex. 748 (1846).

[140] Poll. Cont. (6th Ed.), p. 279; 54 Ala. 150 (1875).

[141] 2 Pet. (U. S.) 527 (1829); 12 How. (U. S.) 79 (1851); 49 Conn. 124 (1881); 133 Mass. 248 (1882).

[142] 13 Conn. 249 (1839); 145 U. S. 421 (1892); 1 Kan. 226 (1862); 75 Va. 239 (1881).

of treaties with foreign countries,[143] but public policy enters more largely into consideration in such cases, to which reference will be made hereinafter. Municipal ordinances are also within the rule.

35. Wagers and Gambling Contracts.—Wagering contracts, if fairly made, were recognized as valid at common law,[144] and many cases will be found without trouble in the older reports, not only in England but in the United States, which accept them as a matter of course.[145] The *feigned issue*, met with in pleading, is in form an action on a wager. The judges seem to have regretted later that wagers could be sued upon at all and declined to enforce wagering contracts that tended to a breach of the peace, or to injure the character, feelings, or interests of a third person, or were contrary to the principles of morality or of sound public policy; finally, in the words of Baron Parke, "becoming astute even to an extent bordering upon the ridiculous to find reasons for refusing to enforce them."[146] In the United States, generally, the courts soon took the position that all wagering contracts were to be held illegal and void as against public policy,[147] and the hostility to wagers has been marked on account of the evil results of betting and gambling.[148]

In England, by legislation, in the case of wagers, the agreement is null and void and a party who pays a gambling debt for another at his request cannot recover the money;[149] in nearly all the United States, statutes, which differ in many details, have been enacted declaring gambling contracts illegal.[150]

An ordinary bet is the simplest form of gambling contract that has been defined to be a wagering contract; in it the

143 14 How. (U. S.) 38 (1852); 49 Fed. Rep. 181 (1892); 50 Minn. 195 (1892).
144 110 U. S. 499 (1883).
145 16 East (Eng.) 150 (1812); 10 Johns. (N. Y.) 406 (1813); 11 Johns. (N. Y.) 23 (1814).
146 4 H. L. Cas. (Eng.) 124 (1853).
147 114 Mass. 80 (1873).
148 17 R. I. 10 (1890); 1 Strobh. (S. C.) 82 (1846).
149 8 & 9 Vict., c. 109; 55 & 56 Vict., c. 9; L. R. 1 Q. B. (Eng.) 44 (1893).
150 Stimson's Am. Stat. Laws, Vol. 1, Sec. 4,132.

parties in effect stipulate that they shall gain or lose upon the happening of an uncertain event, in which they have no interest except that arising from the possibility of such gain or loss.[151]

36. It is unnecessary to refer at length to the simpler classes of wagering contracts that have been the subject of much legislation, among which may be mentioned lotteries, pool selling, gaming, etc. Horse-racing seems to have met with a greater amount of favor in some few communities than other forms of wagering. There is no reason to favor this form of gambling unless it be expressly authorized by statute.

In commercial law, the most important questions in relation to wagering contracts arise in the cases of marine and life insurance and in the stock transactions or dealings in futures. In the law of insurance, a wagering policy is that in which the party assured has no interest in the thing insured and could sustain no possible loss by the event insured against, if he had not made such wager.[152] The determination of what will constitute an insurable interest is an important branch of the law of insurance.[153]

37. In dealings in futures, the generally accepted doctrine is that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods nor any other means of getting them than to go into the market and buy them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer;[154] if, under the guise of such a contract, the real intent be merely to speculate in the rise or fall of prices and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date

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151 89 Pa. 89 (1879); 153 Pa. 247 (1893); Black's Law Dict.

152 2 Mass. 1, at p. 7 (1806); 94 U. S. 457 (1876).

153 See *The Law of Insurance.*

154 149 U. S. 481 (1893).

fixed for executing the contract, then the whole transaction constitutes nothing more than a wager and is null and void.[155] It makes no difference that a bet or a wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of a legitimate trade.[156] Aside from the statutory restrictions that have been imposed in some states with the intention of suppressing all speculation in futures,[157] a man may legitimately buy and sell stocks or commodities upon expectation of the rise or fall of the market, and he is not thereby gambling. The test is whether he bought and sold, and not merely settled on differences; the latter only is gambling.[158]

Where both parties understand and intend that there shall be no actual delivery, but that a settlement shall be made by the payment of the difference in prices, the agreement is a gambling transaction and void;[159] but the burden of proof is upon the party who seeks to impeach such transactions by affirmatively showing their illegality, and the proof must go further and show that this understanding was mutual. If one of the parties only contemplated a wagering contract, this will not relieve him from liability to the other party, who at the time of making the contract contemplated an actual transfer of the property sold or purchased.[160]

38. Sunday Contracts.—At common law, no distinction was made between Sunday and any other day; so far as worldly employment was concerned contracts entered into on that day were as valid as those made on any other day.[161] The subject is one of statutory regulation both in England and the United States.[162] The most important English statute on this subject has been generally adopted in the United States, with occasional changes in phraseology.[163]

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155 110 U. S. 499 (1883); 131 U. S. 336 (1889); L. R. 4 Q. B. Div. (Eng.) 685 (1878).

156 70 N. Y. 202 (1877); 17 R. I. 10 (1890).

157 Am. & Eng. Encyc. Law (2d Ed.), Vol. 14, p. 607.

158 72 Pa. 155 (1872); 192 Pa. 309 (1899).

159 150 Mass. 1 (1889).

160 149 U. S. 481 (1893); 159 Mass. 344 (1893).

161 21 Fed. Rep. 299 (1884).

162 2 Pars. Cont.* 757, note.

163 29 Car. II, c. 7, Sec. 1.

This statute enacts that "no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor, business, or work of their ordinary callings upon the Lord's day or any part thereof, works of necessity or charity only excepted." This statute, it was held in England, only prohibited work of the ordinary calling of the party.[164] The validity of a contract made on Sunday, therefore, depended on whether or not it related to the ordinary calling of the party making it;[165] and this distinction is taken in some of the United States.[166]

39. While the statutes, known as **Sunday laws,** passed by the various states differ to some extent, they are substantially the same in their general scope.[167] There is, however, a great diversity in their interpretation, some states enforcing them with great strictness while others show more liberality.[168] The various acts and the decisions upon them cannot be set out at length, but no distinction is usually made between contracts entered into in the ordinary calling of a party, and contracts or business in general.[169] In a number of the states, the words "ordinary calling" are omitted from the statutes, which are drawn in stronger terms than the English act. The intention of the various legislatures apparently seems to have been to comprehend within the prohibition all acts of a secular nature belonging to or connected with ordinary business or common worldly affairs, although they might not happen to fall within the line of daily business or occupation in which the party happened to be employed.[170]

As to what will constitute a work of necessity or charity, it is almost impossible to lay down a rule that will comprehend the various dicta and decisions.[171] In Pennsylvania, it has been said "supplying the ordinary demands of one's physical nature and relieving from situations of peril and

164 1 Taunt. (Eng.) 131 (1808).
165 4 M. & W. (Eng.) 270 (1838).
166 7 R. I. 22 (1861); 15 R. I. 422 (1886).
167 56 Md. 209 (1881).
168 17 Am. Law Reg. N. S. 281.
169 9 Allen (Mass.) 118 (1864).
170 6 Watts (Pa.) 231 (1837).
171 14 L. Rep. Ann. 192 (1891).

exposure are necessary acts which incur no blame; and perhaps all would agree that visiting and administering to the sick and destitute and labors for the spiritual welfare of men are works of both necessity and charity."[172]

40. In Massachusetts, it is said "the words *necessity* and *charity* have never received a very strict construction, and it has been said that they cover everything which is morally fit and proper to be done under the peculiar circumstances of the case. The work of clergymen, physicians, nurses, apothecaries, and undertakers is also by general concession within the exception. The work of those employed in furnishing articles of daily and general need, like gas, water, milk, mails, telegrams, the Monday morning newspapers, has at least a certain popular sanction as permitted labor."[173] The question is one that must be decided by the circumstances of the case, in the light of local decisions.

41. The **illegality of Sunday contracts,** as already stated, will depend on the local law, but in those jurisdictions where secular business is forbidden on the Lord's day, an agreement to be performed on that day is void for the reason that no court will lend its aid to a party who founds his cause of action on an illegal act.[174] In the same way, if the contract have been executed by the illegal act of both parties on the Lord's day, the law will not assist either party to avoid the effect of his own unlawful act or to recover the price, but will leave the parties, where they have put themselves, in equal fault.[175]

Where an agreement entered into on Sunday is executory, there is some conflict of opinion as to the effect of the same, owing principally to the differences in the phraseology of the Sunday laws of the many states.[176] The generally accepted doctrine is that such agreements are absolutely void.[177]

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172 22 Pa. 102 (1853).
173 155 Mass. 543 (1892).
174 14 Allen (Mass.) 487 (1867); 107 Mass. 439 (1871); 170 Mass. 560 (1898).
175 5 S. Dak. 299 (1894).
176 Am. & Eng. Encyc. Law (1st Ed.), Vol. 24, p. 560.
177 6 Watts (Pa.) 231 (1887); 47 N. J. Eq. 201 (1890).

42. In Illinois, where the statute merely provides for a fine where one "disturbs the peace and good order of society by labor . . . on Sunday," it has been held, that any contract for Sunday work entered into on Sunday is not void by reason of having been made on that day, but may be enforced.[178] In some states, where the statutes merely prohibit "all labor" on Sunday, contracts are not void unless they provide for the performance of work and labor on that day. The decisions of New York,[179] Ohio,[180] Kansas, and Nebraska are to this effect.[181]

In the case of specialties executed on Sunday, if they be also delivered on that day they cannot be enforced at law. But the mere signing of a deed on Sunday, which does not take effect until delivery and which is not delivered until a secular day, will not affect the instrument's validity.[182] Where a promissory note is in fact made on Sunday, but is dated as of a secular day, it is valid in the hands of a *bona fide* holder without notice of the illegality, although the original payee could not have maintained an action upon it.[183]

There is an entire want of harmony in the decisions as to whether a contract entered into on a Sunday can be subsequently ratified. The logical view is that if such a contract be absolutely illegal and void it is incapable of subsequent ratification.[184] Thus, in a Massachusetts case, it was held that the party defendant "could not ratify the illegal contract, because its want of validity did not depend in any degree upon his choice. The law annulled it, and there was no subject of ratification."[185]

The leading case sustaining the opposite view is a decision of the supreme court of Vermont, which held that "contracts made upon Sunday should be held an exception, in some sense, from the general class of contracts which are void for

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178 107 Ill. 429 (1883); 189 Ill. 200 (1901).
179 12 Wend. (N. Y.) 57 (1834).
180 2 Ohio St. 387 (1853).
181 5 Neb. 355 (1877).
182 6 Watts (Pa.) 231 (1837); 2 Pa. 448 (1846); 87 Ind. 269 (1882).
183 107 Mass. 439 (1871); see *The Law of Commercial Paper*.
184 50 Me. 83 (1863); 31 N. J. Law 224 (1865).
185 15 Gray (Mass.) 433 (1860), by Hoar, J.

illegality"[186] and may, therefore, be affirmed.[187] The facts in many of the cases cited as supporting this view really amount to the formation of a new agreement. There can be no doubt but that the Sunday contract may be disregarded entirely and a new contract made on a subsequent secular day, which will be perfectly legal and enforceable.[188]

AGREEMENTS CONTRARY TO MORALITY

43. Agreements in violation of morality and founded on considerations that are against sound morals are void.[189] It is not every kind of agreement which may be classed as immoral that will be regarded as unenforceable in a court of law. All duties enjoined by divine law are not enforced, since the forms and modes of proceeding at law do not enable it to adjust every question of morals; a power of this kind would lead to persecution and oppression and would tend to impair freedom of opinion. That which is called immoral in a legal sense is that which "according to the common understanding of reasonable men would be a scandal for a court of justice to treat as lawful or indifferent."[190] The acts which fall within this category are in a general way obvious enough. Sexual immorality is the subject to which the rule has been applied in most cases, but the principle is by no means limited to offenses of this character. Contracts, for example, for printing immoral books have been held not enforceable.[191]

44. All contracts, whether under seal or not, to pay a certain sum on consideration of future illicit intercourse are utterly void.[192] Past cohabitation is not an unlawful consideration; there may be circumstances under which a man might be under a moral obligation to provide for the

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186 19 Vt. 358 (1847).
187 87 Wis. 152 (1894).
188 61 Mo. 335 (1875); Am. & Eng. Encyc. Law (1st Ed.), Vol. 24, p. 571; Bish. Cont., Sec. 542.
189 1 Story Eq. Jur., Sec. 296; 1 Story Cont., Sec. 670; Poll. Cont. (6th Ed.), p. 286.
190 L. R. 4 Q. B. (Eng.) 309 (1869).
191 6 Montr. Supp. 178 (1890); 2 C. & P. (Eng.) 163, 198 (1825).
192 80 Me. 162 (1888); 55 E. C. L. (Eng.) 483 (1846).

woman.[193] But in this case the general rule applies, that a moral obligation is not a sufficient consideration to support a contract. A contract, therefore, made on no other consideration than past cohabitation is merely a voluntary agreement, or *nudum pactum*, incapable of enforcement unless under seal, where the seal may be said to import a consideration. Where such a contract has been executed, or the gift completed by an actual transfer of money or property, the court will not lend its aid to recover it.[194]

45. Any contract encouraging, or in furtherance of, sexual immorality is void; for example, a lease made with knowledge of the lessor that the house is rented for purposes of prostitution.[195] So, also, it is held that a partnership formed for the purpose of letting apartments for the purpose of prostitution is illegal, and neither partner can maintain an action for an accounting against the other.[196]

46. Agreements of voluntary separation between husband and wife were originally regarded in the English courts, from the ecclesiastical point of view, as against sound morals and illegal. But this doctrine has long been abandoned and, although reluctantly at first, the courts have long recognized deeds of separation as contracts capable of being enforced at common law.[197] Contracts of this nature for the separate maintenance of the wife, through the intervention of a trustee, have received the sanction of the courts in England and in the United States for so long a period of time that the law on this subject must be considered as settled.[198] But agreements providing for a future separation are wholly void.[199]

AGREEMENTS CONTRARY TO PUBLIC POLICY

47. An agreement in contravention of sound public policy is void.[200] **Public policy** does not admit of a definition and is not easily explained. It is a quantity that varies

193 106 U. S. 679 (1882); L. R. 16 Eq. (Eng.) 275 (1873); 23 Pa. 338 (1854).
194 L. R. 16 Eq. (Eng.) 275 (1873); 10 Bush (Ky.) 519 (1874).
195 4 Tex. Civ. App. 459 (1893).
196 27 Mo. App. 649 (1887).
197 4 De G. F. & J. (Eng.) 221 (1861).
198 9 Wall. (U. S.) 743 (1869).
199 3 K. & J. (Eng.) 382 (1857).
200 4 H. L. Cas. (Eng.) 1 (1853).

with the habits, capacities, and opportunities of the public, and the usages of trade.[201] It is, however, laid down as a rule that wherever any contract conflicts with the morals of the time, and contravenes any established interest of society, it is void as being against public policy.[202] The power of courts to declare a contract void as against public policy is a very delicate and undefined power, and should be exercised only in cases free from doubt; prejudice to the public interest must clearly appear before a court is justified in pronouncing an agreement void on this account.[203]

Evidence of the public policy of a state is ordinarily sought in the constitution, statutes, and judicial decisions of the state.[204] The right of parties to contract freely and fairly cannot be denied upon the ground of an adverse public policy, unless it clearly appear that there be a recognized public policy touching the subject-matter which will be violated if the contract be enforced. As the relations of society from time to time become more complex, the doctrine of public policy must be extended to meet new conditions and, therefore, new applications of old principles are required.

In the United States, it is said that there is a public policy of the nation applicable to all matters wherein the people at large are interested, including those committed to the control of the national government and coextensive with the boundaries of the union; there is, also, a state public policy adapted to the circumstances of the locality embraced within the boundaries of the state and applicable to all matters within state control.[205]

CONTRACTS AGAINST PUBLIC POLICY AS AFFECTING THE STATE

48. External Relations.—At common law, trading with an enemy without the king's license was illegal.[206] The presumed object of war being as much to cripple the

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201 36 Ch. Div. (Eng.) 359 (1887).
202 1 Story Cont., Sec. 675.
203 65 Vt. 431 (1893); 152 Pa. 139 (1893).
204 62 Fed. Rep. 904 (1894); 175 U. S. 91 (1899); 50 N. J. Eq. 761 (1893).
205 62 Fed. Rep. 904 (1894).
206 8 T. R. (Eng.) 548 (1800); 7 E. & B. (Eng.) 762 (1857).

enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country; such intercourse is illegal without the license of the crown.[207] In war, therefore, no commercial contract is considered valid between enemies, citizens of the belligerent countries, at least so far as to give them a remedy in the courts of either government.[208] Where there is an existing contract and war is declared, the effect is to suspend the contract during hostilities, unless the nature and object of the contract be inconsistent with suspension, in which case the effect is to dissolve the contract and discharge both parties from further performance.[209]

A contract cannot be enforced which has for its purpose the conduct of hostilities against a country with which the nation is at peace.[210] Such an agreement would clearly be a violation of the laws of neutrality.[211] While an agreement to violate the laws of a foreign country would seem, from the English decisions, to be unlawful, yet revenue laws are said to be an exception, although all the eminent writers strongly disapprove of such a doctrine.[212]

49. Internal Relations.—Contracts prejudicial to the state in its internal relations are against public policy and illegal. These include (*a*) such as tend to interfere with or control the executive or legislative departments of the government; (*b*) such as tend to the obstruction or perversion of the administration of the law; (*c*) such as tend to prevent the performance of those legal duties of individuals in which the public has an interest.[213]

50. All agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public

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[207] See *subtitle* Aliens *supra*.

[208] 15 Johns. (N. Y.) 57 (1818); 100 Mass. 561 (1868).

[209] 20 Wall. (U. S.) 459 (1874); Poll. Cont. (6th Ed.), p. 305; 93 U. S. 24 (1876).

[210] 56 Fed. Rep. 505 (1893).

[211] 84 Fed. Rep. 799 (1898); 14 How. (U. S.) 38 (1852).

[212] Story Cont., Sec. 717; 3 Kent's Comm., p. 263.

[213] 50 N. J. Eq. 761 (1893).

offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks at the general tendency of such agreements, and it closes the door to temptation, by refusing them recognition in any of the courts of the country.[214]

This principle has been asserted in a great variety of cases; for example, in cases relating to agreements for compensation to procure legislation have uniformly been held invalid, not so much because improper influences were contemplated as on account of the corrupting tendency of all such agreements.[215] "Legislation should be prompted solely from considerations of the public good, and the best means of advancing it. Whatever tends to divert the intention of legislators from their high duties, to mislead their judgment, or to substitute other motives for their conduct than the advancement of the public interests, must necessarily and directly tend to impair the integrity of our political institutions."[216]

All persons whose interests may in any way be affected by any public or private act of the legislature have an undoubted right to urge their claims, either in person or by counsel professing to act for them, before legislative committees as well as in courts of justice. But where persons act as counsel or agents, or in any representative capacity, they should honestly appear in their true character. Any attempt to deceive persons entrusted with the high functions of legislation by secret combinations, or by bringing into operation undue influence of any kind, have all the injurious effects of a direct fraud on the public.[217]

The same principle of public policy has been applied to render invalid all agreements and bargains to procure appointments to, or resignations from, public office. These offices are regarded as trusts held solely for the public good and should be conferred only from considerations of ability,

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214 2 Wall. (U. S.) 45 (1864).

215 16 How. (U. S.) 314 (1853); 149 Pa. 375 (1892).

216 21 Wall. (U. S.) 441 (1874), quoting Field, J., in 2 Wall. 55 (1864).

217 16 How. (U. S.) 314, at p. 335 (1853).

integrity, fidelity, and fitness for the position. Agreements to procure, or traffic, in such appointments are detrimental to the public service and inconsistent with sound morals and public policy.[218] So, also, an agreement to divide the receipts of a public office with a rival candidate, and an agreement by a candidate for office to accept a smaller compensation than that provided by law, have been held contrary to public policy.[219]

51. Agreements upon pecuniary considerations, or the promise of them, to influence the conduct of officers charged with duties affecting public interests, or with duties of a fiduciary character to private parties, are against the policy of the state, which is to secure fidelity in the discharge of all duties.[220] Agreements of that character introduce mercenary considerations to control the conduct of parties and are corrupt in their tendencies. As before stated, an assignment by a public officer of his official salary or fees is void, as being contrary to public policy.[221]

A contract to pay a public officer for doing his duty when he is required to do it without such payment, or to pay him a greater sum than contemplated by the laws of the government he is serving under, is void. But an officer may be remunerated for services not within the scope of his public duties and employment.[222]

52. All agreements relating to proceedings in the courts to control the regular administration of justice, or which may involve anything inconsistent with the full and impartial course of justice therein, are void. Nor is it necessary that actual fraud be shown; for a contract of this character is void, although the parties proceeded under it in good faith, the question being, not whether the public have, in fact, suffered any detriment, but whether the contract be such as might have been injurious to the public. The law looks to

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[218] 71 Pa. 282 (1872).
[219] 104 Iowa 625 (1898); 72 Mo. 13 (1880).
[220] 129 U. S. 643 (1888).
[221] 86 Tex. 303 (1893); see *subtitle* Assignments *supra*.
[222] 152 Pa. 139 (1893).

the general tendency of such contracts.[223] Agreements for the purpose of stifling criminal prosecutions come within this rule, since such proceedings are an abuse of criminal process and tend to impede the due course of public justice.[224] A contract whereby an attorney, for a contingent fee, undertook to procure the settlement of a criminal charge is against public policy;[225] and the same is true of contracts to procure signatures and obtain a pardon from a governor for one convicted of a criminal offense and sentenced to punishment.[226] An agreement with a stranger to an action to furnish evidence to substantiate a claim or defense for a compensation depending on the result of his efforts, is against public policy and void.[227]

Agreements to refer matters to arbitration, while not void, were (and still are to a certain extent) regarded as against public policy, in so far as they tend to oust the jurisdiction of the court, and could not be set up as a bar to an ordinary action at law brought to determine the question in dispute, which it was agreed to refer.[228] Statutory provisions prevail now, in almost all jurisdictions, favoring arbitration. The parties have an undoubted right, if they wish, to make arbitration a condition precedent to any right of action arising at all.[229]

53. It is contrary to public policy to give encouragement to contracts that savor of *maintenance* or *champerty*, upon the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce.[230]

54. **Maintenance** is an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money, or otherwise, to prosecute or defend

223 137 Ind. 655, 669 (1893), quoting Greenhood on Public Policy, p. 5; 144 Ill. 422 (1893).
224 137 Mass. 583 (1884).
225 100 Pa. 561 (1882).
226 7 Watts (Pa.) 152 (1838).
227 14 Mont. 467 (1894).
228 86 Hun (N. Y.) 380 (1895); 33 Centr. L. J. (Mo.) 168 (1891); L. R. (1892) 3 Ch. (Eng.) 441; 5 H. L. Cas. (Eng.) 811 (1856).
229 136 U. S. 242 (1890).
230 1 Y. & C. Ex. (Eng.) 481 (1835).

it.[231] **Champerty** is a bargain with the plaintiff or defendant to divide the land or other matter sued for between them, if they prevail at law; whereupon the **champertor** is to carry on the party's suit at his own expense.[232] The distinction between the two is that where there is no agreement to divide the thing in suit the party intermeddling is guilty only of *maintenance*.

Both maintenance and champerty are criminal offenses, both by common law and statute. Contracts, therefore, for the maintenance of suit, or for champerty, are illegal and void.[233] In early times the law on this subject was enforced with extreme severity, and it is still strongly upheld in England and in many of the United States; in some states, it has met with only a partial or modified recognition.[234]

In modern times, the question of champerty in contracts arises chiefly in agreements between attorneys and clients as to contingent fees. In England, it has been held that an agreement with a solicitor to give a portion of the profits arising from the successful prosecution of a suit upon being indemnified against courts is champerty.[235]

55. In the United States, rules of different strictness prevail in the different states. In New York and Pennsylvania, an attorney may agree with his client to render professional services for a contingent fee.[236] Such contracts are of common occurrence and, while their propriety has been vehemently debated, they are not illegal and, when fairly made, are enforced.[237]

In Massachusetts, it is said "where the right to compensation is not confined to an interest in the thing recovered, but gives a right of action against the party, though pledging the avails of the suit, or a part of them, as security for payment, the agreement is not champerty."[238]

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231 4 Black. Comm. 134.
232 *Ibid.* 135.
233 Story Cont., Sec. 710; L. R. 8 Q. B. (Eng.) 112 (1873).
234 Poll. Cont., p. 320 *et seq.*; Am. & Eng. Encyc. Law (2d. Ed.), Vol. 5, p. 822.
235 L. R. 4 Eq. (Eng.) 432 (1867); 43 U. C. Q. B. 143 (1878).
236 102 N. Y. 395 (1886).
237 105 Pa. 83 (1884).
238 138 Mass. 530 (1885); 144 Mass. 393 (1887).

Other states have held, practically, that, in order to taint a contract with champerty, the agreement between the attorney and client must provide, not only that the attorney shall have a part of the money or thing recovered, but that he must also, at his own expense, support and carry on the suit and take all the risks of the litigation.[239]

56. Although claims against the United States are not generally assignable, congress has, in some cases, permitted contracts to be made for the payment of attorneys prosecuting claims against the government by way of contingent fees to a limited amount, subject to the regulation of the court. Such contracts have been upheld on the ground that any other rule would work a hardship in cases of creditors of small means residing far from the seat of government, who can give neither money nor personal attention to securing their rights.[240]

A contract between an attorney and client, whereby the client agrees not to compromise or settle his claim, is void as tending to foster and encourage litigation.[241] The policy of the law is not to discourage settlements and compromises of doubtful rights.

57. Agreements that tend to prevent the performance of legal duties toward individuals, in which the public have interest, are also against public policy. In this class are contracts made by a father to deprive himself of the right to the custody of his child.[242] This right grows out of and depends on the duties which he owes to that child, and the law recognizes his right as a means of enforcing such duty.[243] But, while recognizing this rule, the court will take cognizance of the character and conduct of the parent, the welfare of the child being the prime consideration in questions of this character.[244]

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239 40 Kan. 195 (1888); 119 Ill. 626 (1887).
240 161 U. S. 72 (1896); 110 U. S. 42 (1883).
241 171 Ill. 100 (1898).
242 L. R. 8 Q. B. (Eng.) 153 (1873).
243 L. R. 13 Eq. (Eng.) 511 (1872).
244 164 Pa. 266 (1894).

CONTRACTS AGAINST PUBLIC POLICY AFFECTING INDIVIDUAL ACTION

58. While, generally, the free action of individuals should be untrammeled by unreasonable restrictions, and every man permitted the utmost liberty in contracting, yet there are certain matters as to which this freedom is especially limited for the good of the public at large. Such are contracts in restraint of marriage and contracts in restraint of trade.

59. Contracts Affecting Marriage.—A contract not to marry at all, or to marry no one unless it be a particular person, is a contract in restraint of marriage and is void.[245] Such contracts are considered injurious to the general interests of society, the policy of the law being to encourage entire freedom of choice in marriage.[246]

In the same manner, a marriage-brokerage contract, an agreement to negotiate a marriage for a compensation, is illegal and void.[247] All such contracts are void upon consideration of public policy, "because they are a public mischief, as they have a tendency to cause matrimony to be contracted on mistaken principles, and they are relieved against as a general mischief, for the sake of the public."[248]

60. We have already discussed agreements for separation and how far the courts will permit them to be sustained. A contract, however, the purpose of which is to facilitate the procuring of a divorce at the suit of either of the parties is contrary to the settled policy of the law and, therefore, void.[249] Marriage is more than a mere civil contract; it is a matter of state concern, and when the marital relation is once created it cannot be dissolved by any agreement of the parties.[250] It can be dissolved only for the causes allowed by law, and any agreement having for its object the dissolution of a marriage contract, or designed to promote and facilitate a divorce, is void, and no promise founded on such

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245 4 Burr (Eng.) 2,225 (1768).
246 80 Me. 287 (1888).
247 115 Cal. 252 (1896).
248 62 Barb. (N. Y.) 99 (1872), quoting from 7 Mass. 112 (1810).
249 37 Neb. 891 (1893).
250 112 Mo. 159 (1892).

an agreement will be enforced. An agreement for a collusive suit, or an agreement not to make a defense to an action for divorce, comes within the rule, no matter whether the original cause of action be well founded or not.[251]

An agreement for the compromise of a divorce suit and the putting of an end to such an action is not against public policy, since it tends to restore peace between the husband and wife and a renewal of conjugal relations.[252] The law discountenances separations and favors the settlement of controversies.[253] Where a note was given to a trustee for a married woman by the husband, in consideration that she should return and live with him, it was held that the contract was not one that the court would recognize as valid.[254] Had the consideration been an agreement not to prosecute proceedings for a divorce, a different ruling might have been obtained.[255]

61. Contracts in Restraint of Trade.—An agreement in general or total restraint of trade is void. In England, from a very early period, this doctrine has been held, the courts apparently opposing all restrictions upon trade alike whether limited or unlimited.[256] In the earliest reported case, where the action was on a bond conditioned that the defendant should not exercise his craft as a dyer for a limited period, the court held the obligation void, because the condition was against the common law.[257] The reasons for the rule are that such contracts injure the parties making them by diminishing their means of earning a livelihood, deprive the public of the services of men employed in capacities useful to the community, discourage industry and enterprise, prevent competition, and foster monopolies.[258]

The doctrine extends to all branches of trade and all kinds of business and is still in force, although in deciding

251 78 Pa. 194 (1875); 169 Pa. 529 (1895); 106 Cal. 509 (1895).
252 1 H. L. Cas. (Eng.) 538 (1848).
253 91 N. Y. 381 (1883); 105 Pa. 31 (1884); 49 N. J. Eq. 429 (1892).
254 146 Mass. 460 (1887).
255 167 Mass. 211 (1896).
256 1 Story Cont., Sec. 679.
257 2 Henry V (Eng.), 26 (1415), by Hull, J., cited in Poll. Cont., p. 341 (6th Ed.).
258 1 P. Wms. (Eng.) 181 (1711); 19 Pick. (Mass.) 51 (1837).

what amounts to a general restraint there has been a gradual relaxation in the rule to suit developments of trade and to bring the same into conformity with modern ideas and views of public policy and of reasonableness.[259]

62. An agreement in partial restraint of trade, restricting its exercise within reasonable limits, is valid.[260] As to what those limits are, which will be regarded as reasonable, is one of the most difficult questions that the courts are called upon to decide. The older decisions hold that the restriction must be limited as to place or as to time. But the old hard-and-fast distinctions between general and partial restraints are very generally regarded as inapplicable to the altered conditions that now prevail. Thus, a covenant entered into in connection with the sale of the goodwill of a particular business must be valid where the full benefit of the purchase cannot be otherwise secured to the purchaser.

In the latest English decisions, the test applied to determine whether the restraint is reasonable or not is to consider whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive and, if oppressive, it is, in the eye of the law, unreasonable.[261]

In the United States, as in England, the changes in the methods of doing business and the increased freedom of communication that has come in recent years, have materially modified the view to be taken of contracts in restraint of trade.[262] While the general principle that agreements in restraint of trade are not favored is firmly established, yet the comparative ease with which one engaged in business can turn his energies to a new occupation, if he contract to

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[259] L. R. (1893) 1 Ch. D. (Eng.) 630.

[260] 1 Story Cont. (5th Ed.), Sec. 680; L. R. (1894) App. Cas. (Eng.) 535, affirming L. R. (1893) 1 Ch. D. (Eng.) 630.

[261] 7 Bing. (Eng.) 735 (1831).

[262] 171 Mass. 101 (1898).

give up his old one, makes the hardship of such a contract much less for the individual than formerly, and the commercial opportunities that open the markets of the world to the merchants of every country leave little danger to the community from an agreement of an individual to cease to work in a particular field.[263]

63. The right to make reasonable contracts of this kind in connection with the sale of the good-will of a business is well established, and the vendor will be bound by any covenant that is reasonably necessary for the fair protection and preservation of the good-will which is sold.[264] In those cases in which such covenants have been held bad, they were deemed to go further than was reasonable to give full value to the property sold.[265] "While it is justly urged that those rules which say that a given contract against public policy should not be arbitrarily extended so as to interfere with the freedom of contract, yet, in the instance of business of such a character that it presumably cannot be restrained to any extent whatever, without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. . . . Public welfare is first considered, and if it be not involved, and the restraint upon one party be not greater than protection to the other party requires, the contract may be sustained."[266]

64. The test question in every case is whether or not a contract in restraint of trade exists which is injurious to the public interests. If it be injurious, it is void as against public policy. Courts will not stop to inquire as to the degree of injury inflicted.[267] It is enough to know that the natural tendency of such contracts is injurious. This rule is applied particularly in those cases where the natural effect of such a contract would be to create a monopoly. The

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263 171 Mass. 105 (1898), per Knowlton, J.

264 106 N. Y. 473 (1887); 45 Minn. 272 (1891); 64 Fed. Rep. 946 (1894); 26 Atl. Rep. 977 (1893).

265 18 Pa. Sup. 28 (1901).

266 130 U. S. 396 (1888), by Chief Justice Fuller.

267 161 Pa. 473 (1894).

decisions are far from uniform, as the courts have, in the different cases, arrived at different conclusions as to whether, under the given circumstances, the contract were actually injurious to the public interests.

65. A distinction has sometimes been made between those combinations which attempt to control the sale of the necessities of life or articles in daily consumption.[268] But, while a greater amount of disfavor is shown to such combinations, the doctrine is not limited to such cases, the true test, as said before, being the injury to the public interests.[269] The law, as now understood, restrains no one from selling his property, nor does it compel any one to continue a business that he can sell, or finds it to his interest to abandon; much less to continue it for any time or in any particular place.[270]

EFFECT OF ILLEGALITY

66. It is the general rule of law that no right of action can spring out of an illegal contract, and this rule applies whether the contract is illegal on the ground of positive law, morality, or public policy. The rule is expressed by the well-known maxim, *ex turpi causa non oritur actio* (no action arises out of an immoral consideration). Whenever the consideration that is the ground of promise, or the promise on which the consideration is based, is illegal, the contract is void.[271]

There is, however, in this connection a distinction between entire and divisible contracts. Where the promise is made for one entire consideration, a part of which is fraudulent, immoral, or unlawful, and there has been no appointment made or means of appointment furnished by the parties themselves, it is well settled that no action will lie on the promise. If the bad stipulations be not severable from the good, the whole fails.[272]

67. An indivisible promise founded upon two considerations, one of which is legal and the other illegal, will not be

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268 83 Tex. 650 (1892); 145 N. Y. 267 (1895).
269 166 N. Y. 292 (1901).
270 164 N. Y. 401 (1900).
271 Bro. Leg. Max. (7th Ed.), p. 556.
272 91 Iowa 108 (1894); 146 Mass. 469 (1888).

enforced.[273] Where, however, an agreement contains separate and distinct promises, by which a party is bound to do certain acts, some of which are legal and others illegal, the consideration will support the legal promises;[274] the illegality of those that are bad will not contaminate those that are good.[275]

68. Courts of justice will not enforce the execution of illegal contracts nor aid in the division of the profits of an illegal transaction between associates; neither party, if in equal fault, can have assistance from a court of justice.[276] Where both are in equal fault, the condition of the defendant is the stronger. Hence, money paid in the execution of an illegal contract cannot, as a general rule, be recovered;[277] and, so far as the contract is executory, a defendant, although in equal fault, may set up the illegality of the consideration as a defense. The true test for determining whether or not the plaintiff and the defendant were in equal fault is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party.[278]

When the immediate object or consideration of an agreement is not unlawful, but the intention of one or both of the parties is to further an illegal purpose, then, if the unlawful intention be common to both parties, the agreement is void.[279] It is by no means an easy question to determine when the parties are in equal fault. The result of the English decisions is that, if the unlawful intention be entertained by one party with the knowledge of the other, the agreement is void. But, on the other hand, there are decisions to the effect that mere suspicion or knowledge only by a vendor that a purchaser intends to make an illegal use of the property is not a defense unless the vendor was implicated in the illegal design and sold the goods for this purpose.[280] It is difficult to draw the line between these extremes.

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273 42 Neb. 818 (1894).
274 20 Wall. (U. S.) 64 (1873).
275 138 Ill. 390 (1891); 35 N. J. Law 240 (1871); 11 M. & W. (Eng.) 653 (1843).
276 144 Ill. 422 (1893).
277 100 Cal. 18 (1893).
278 Whart. Cont., Sec. 340; L. R. 4 Q. B. (Eng.) 309 (1869).
279 Poll. Cont. (6th Ed.), p. 351; 12 Wall. (U. S.) 342 (1870).
280 Whart. Cont., Sec. 342; 14 N. Y. 162 (1856); 156 Mass. 211 (1892).

69. Where a contract is still executory, the illegal contract may be rescinded by either party, who may recover whatever consideration he has paid.[281] The reason for this is, that the claim is not to enforce but to repudiate an illegal agreement. In such a case, there is said to be a *locus pœnitentiæ* (place of repentance); the wrong is not consummated and the contract may be rescinded.[282]

There is a class of cases where the parties are not regarded as in equal fault and where relief has been afforded to the least guilty party when he appears to have acted under circumstances of imposition, hardship, or undue influence, and especially where there is a necessity of supporting public interests, or a well-settled policy of the law, sometimes declared by statute and sometimes the outgrowth of decisions.[283] This is particularly the case where a statute specifically imposes a penalty on one of the parties.[284]

70. Where the original agreement is illegal, all subsequent securities given for the prior illegal indebtedness are, as between the parties, tainted with the original illegality and void.[285] This does not apply to negotiable paper in the hands of an innocent holder for value without notice of the illegality.[286]

Where there is nothing on the face of a contract to render it illegal it will be presumed legal until the contrary be shown,[287] and where a contract is capable of two constructions, one legal and the other illegal, the one making it legal should be adopted, since it is not to be presumed that the parties to a contract intend to violate the law.[288] Extrinsic evidence, however, is always admissible to show that an agreement is, in fact, an illegal one, or that the intention of the parties in entering into the agreement was to further an illegal object. The rule that forbids the introduction of

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[281] 1 Q. B. Div. (Eng.) 291 (1876); 23 Ore. 415 (1893).
[282] 103 U. S. 49 (1880).
[283] 124 N. Y. 156 (1891); 57 N. J. Law 239 (1894).
[284] L. R. (1893) 2 Ch. D. (Eng.) 154.
[285] 3 E. & B. (Eng.) 642 (1854).
[286] 28 Pa. 294 (1857).
[287] 4 E. & B. (Eng.) 397 (1855); 52 Me. 574 (1864).
[288] 64 Conn. 264 (1894).

parol evidence to vary a written instrument does not extend to evidence offered to show that a contract was made in furtherance of objects forbidden by statute or of the general policy of the law.[289]

STATUTE OF FRAUDS

71. The English statute entitled "An Act for Prevention of Frauds and Perjuries," popularly known as the **statute of frauds,**[290] has been an endless source of litigation.[291] The act was designed to exclude oral testimony in certain classes of transactions, which it was thought should be supported by stronger evidence than mere verbal testimony of witnesses. The danger of fraud and perjury, and the risks of mistakes arising from the defective and imperfect recollection of witnesses, were the evils against which the provisions of the statute were directed.[292]

The statute in whole or part has been reenacted in the United States, but with so many variations in the different states as to render a decision in one jurisdiction almost useless as a precedent in another. In all the courts its discussion has given rise to so many subtle distinctions, and there are so many questions arising out of it that are only partially settled, that a comprehensive view of the subject is almost impossible. The sections with which the law of contracts is chiefly concerned are here given:

"SECTION 4.—No action shall be brought whereby to charge (1) any executor or administrator upon any special promise, to answer damage out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making

289 52 Kan. 139 (1893).
290 Stat. 29 Car. II, c. 3 (1677).
291 Reed Fraud, Vol. 1, c. 1; Am. & Eng. Encyc. Law (1st Ed.), Vol. 8, p. 657.
292 9 Allen (Mass.) 8 (1864).

thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized."[293]

"SECTION 17.—No contract for the sale of any goods, wares, and merchandise for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."[294]

The effect of these sections is not to render the contracts within them void, still less illegal, but to render the kind of evidence required indispensable when it is sought to enforce the contract.[295] Where the contract has been fully performed on both sides the position of the parties is fixed, and the obligations arising upon such performance remain unaffected by the statute.[296]

Since the statute of frauds affects the remedy on contracts otherwise valid, it has been held that where the contract is within the statute as enacted in the jurisdiction where the action is brought the action cannot be maintained, although the contract be valid and enforceable by the laws of the place where it was made.[297] But the contrary doctrine has been vigorously maintained in a number of decisions.[298]

72. Promises by Executors and Administrators. This clause was enacted to prevent executors and administrators from being fraudulently held for the debts and liabilities of the estates upon which they were called to administer, and is closely allied with the next following

293 Bro. St. Fr. (5th Ed.), p. 136.
294 *Ibid.*
295 L. R. 8 App. Cas. 467, at p. 488 (1883); 118 Mass. 325 (1875).
296 100 Ala. 430 (1893); 12 Mass. 514 (1815).
297 12 C. B. (Eng.) 801 (1852); 12 R. I. 265 (1879).
298 Cases collected in 5 Ind. App. 89 (1892).

clause; the undertaking contemplated by it, like that contemplated in the next clause, is in the nature of a guaranty.[299]

73. Promises to Answer for the Debt, Default, or Miscarriage of Another. — The terms *debt*, *default*, or *miscarriage* include every case in which one party can become liable to another in a civil action;[300] but the liability must be a legal one capable of being enforced.[301] The promise must be made directly to the creditor; a promise to the debtor to pay his debt and thereby relieve him from the payment of it himself is not within the statute.[302]

To bring a promise within the statute there must be a debt or default of a third person for which that third person continues liable. A promise to become liable independently of any one else is not within the statute. Thus, if two come to a shop, and one buy, and the other, to gain him credit, promise the seller "if he does not pay you, I will," this is a collateral undertaking and void without writing by the statute of frauds. But if he say "let him have the goods, I will be your paymaster," or "I will see you paid," there is an undertaking as for himself, and he shall be intended to be the very buyer.[303]

74. There is great difficulty in determining exactly what are original and what are collateral promises. On no question has there been a greater diversity and contrariety of judicial decision, and, in view of this conflict of authorities, it is difficult to formulate a general rule by which to determine in every case whether a promise relating to the liability of a third person be or be not within the statute. But it may be said generally that when the leading object of the promise or agreement is to become guarantor to the promisee for a debt for which a third party is and continues to be primarily liable, the agreement, whether made before, after, or at the time of, the promise of the principal, is within the statute and must be evidenced by writing. On

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299 57 Vt. 164 (1884).
300 Bro. St. Fr., Sec. 155.
301 2 B. & Ald. (Eng.) 613 (1819); 63 N. C. 198 (1869).
302 9 Gray (Mass.) 76 (1857).
303 1 Salk. (Eng.) 27 (1705).

the other hand, whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute,[304] although it may be in form a promise to pay the debt of another and although the performance of it may incidentally have the effect of extinguishing that liability.[305] If the contract be such that it substantially transfers the debt to the promisor and in effect discharges the original liability, then it is not within the statute since it amounts to a new contract.[306]

There is a hopeless conflict of authorities, produced largely by the conflicting English decisions, on the question as to whether or not a contract of indemnity is or is not within the statute. It is impossible to state any general rule and the student must examine the local decisions to arrive at any conclusion on this branch of the subject.[307] The weight of authority seems to be in favor of the view that a promise of indemnity is an original rather than a collateral undertaking.[308]

75. Promises in Consideration of Marriage. This clause of the statute is not in force in Pennsylvania, North Carolina, and Louisiana.[309] In jurisdictions where it is in force, it applies to all contracts whereof marriage is the consideration, including settlements and antenuptial contracts made in view of marriage.[310] But mutual promises of marriage, that is, a promise to marry in consideration of a similar promise by the other party, are not within the statute of frauds.[311]

76. Contracts Concerning Lands. — This clause, with various modifications, has been adopted in all the states

304 111 Pa. 471 (1886); 167 Pa. 429 (1895); L. R. 7 H. L. Cas. (Eng.) 17 (1874); 3 Metc. (Mass.) 365 (1841).

305 22 How. (U. S.) 28 (1859); 141 U. S. 479 (1891); 105 Mich. 31 (1895).

306 30 Vt. 641 (1858).

307 1 Beach Cont., Sec. 520.

308 64 Conn. 264 (1894); 145 N. Y. 446 (1895).

309 Stimson's Am. Stat. Law, Sec. 4,140

310 148 Ill. 563 (1893).

311 20 Conn. 495 (1850).

except Pennsylvania.[312] The consideration of this clause belongs properly to the law of real estate. The words, however, have a wide operation and apply both to sales and exchanges.[313] The statute is as equally binding, in this respect, on courts of equity as of law.[314]

The chief conflicts upon this clause have arisen upon the meaning of the words "any interest in or concerning them," particularly with reference to the sale of timber or crops.[315] It has been very generally held that growing crops are personalty and not within the statute, particularly crops produced by labor,[316] while natural growths have been held to be real estate. Assuming this distinction, there remains to be determined in each case what is the natural and what the artificial product. The most reasonable guide is to regard the question as one depending on the intention of the parties, as evidenced by their contract.[317]

77. Contracts Not to Be Performed Within One Year. — This clause, which is not in force in Pennsylvania, North Carolina, and Louisiana,[318] means to include any agreement, which by a fair and reasonable interpretation of the terms used by the parties, and in view of all the circumstances existing at the time, does not admit of its performance, according to its language and intention, within a year from the time of its making.[319] The statute applies only to contracts which by their terms *are not* to be performed within a year and does not apply merely because they *may not* be performed within that time. In other words, to make a parol contract void for this reason, it must appear that it was the understanding of the parties that it was not to be performed within a year from the time it was made, or that performance within the year is clearly impossible.[320]

In England, the rule has been laid down that if all that is to be performed on one side is to be performed within one

312 Am. & Eng. Encyc. Law (1st Ed.), Vol. 8, p. 694, note 3.
313 See *The Law of Property:* Sales of Personal Property.
314 4 Wall. (U. S.) 513 (1866).
315 27 Vt. 157 (1854); 45 N. H. 313 (1864).
316 40 Md. 212 (1874).
317 L. R. 1 C. P. D. (Eng.) 35 (1875).
318 Stimson's Am. Stat. Law, Sec. 4,140.
319 54 Fed. Rep. 922 (1893).
320 96 U. S. 404 (1877).

year from the making of the contract, the statute does not apply, performance by one side within the year taking the case out of the statute.[321] The doctrine has met with severe criticism, and indeed the question has generally arisen in cases where the contract has been fully executed on one side and the right to recover might have been placed on the ground of an implied promise to pay. The English rule has been sustained in the United States, particularly in the Western and Southern states;[322] on the other hand, it is rejected by Massachusetts,[323] New York,[324] and Vermont.[325]

78. Contracts for the Sale of Goods, Wares, and Merchandise. — The seventeenth section of the statute of frauds, quoted above, applies to all contracts for the sale of goods of the value of ten pounds, or upwards. It has been reenacted in the United States by the different states, but with varied phraseology, the statutes differing particularly in the limit of price.[326] The section is not in force in Pennsylvania. The statute applies not only to executed sales and contracts calling for immediate delivery of the goods, but also to executory contracts calling for future delivery.[327]

The mere circumstance that the article is not in existence at the time of the bargain will not prevent the application of the statute.[328] There, however, is a distinction taken in many cases between the purchase of articles which the vendor regularly manufactures from time to time and has for sale in the ordinary course of his business, and those which are made to order from materials in his possession.[329] On account of the infinite variety of contracts and the different views that have from time to time prevailed on the subject, the question is a difficult one.[330]

79. The rule that now prevails in England and Canada seems to be that the court must look at the particular

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321 Bro. St. Fr. (5th Ed.), Sec. 286; L. R. 32 Ch. D. (Eng.) 266 (1886); 124 Ind. 416 (1890).
322 80 Wis. 166 (1891); 85 Va. 928 (1889).
323 9 Allen (Mass.) 8 (1864).
324 2 Denio (N. Y.) 87 (1846).
325 28 Vt. 34 (1855).
326 Stimson's Am. Stat. Law, Sec. 4,144
327 5 B. & Ald. (Eng.) 613 (1822).
328 48 N. H. 294 (1869).
329 Bro. St. Fr., Sec. 304.
330 9 Metc. (Mass.) 177 (1845).

contract to discover the intention of the parties. If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but if the result of the contract be that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered.[331] The value of the skill and labor as compared with the material supplied is not the criterion to be applied in such cases.[332]

80. The Massachusetts rule, which is the one most generally followed in the United States, is: If the contract be substantially for the goods, it is within the statute, whether they be manufactured or not,[333] but it is otherwise if the contract be to manufacture and deliver the goods by special order; that is, if the labor and skill of the seller be stipulated for and make part of the contract.[334] A contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods to which the statute applies. But, on the other hand, if the goods are to be manufactured especially for the purchaser and upon his special order, and not for the general market, the case is not within the statute.[335]

81. The New York rule is still different. In that state, it is held that an agreement for the sale of any commodity not in existence at the time of the agreement is not a contract of sale within the statute; but where the chattel is in existence, the contract is a sale, although work remains to be done upon it to adapt it to the uses of the purchaser.[336]

82. In England, shares of stock are held not within the scope of this section of the statute.[337] In the United States, the rule is otherwise and a sale of shares of stock in a

331 1 B. & S. (Eng.) 272, at p. 277 (1861); 33 U. C. Q. B. 442 (1873).
332 47 N. J. Law 334 (1885).
333 48 N. H. 294 (1869).
334 21 Pick. (Mass.) 205 (1838).
335 115 Mass. 450 (1874).
336 65 N. Y. 352 (1875).
337 11 Ad. & Ell. (Eng.) 205 (1839).

corporation is within the statute,[338] which has been held, in some decisions, to include even promissory notes.[339] But an oral agreement for the sale of an interest in an invention is not within the statute.[340] The words of the statute have never yet been extended beyond securities that are subjects of common sale and barter, and have a visible and palpable form.

83. As to the proviso that the sale shall be good where the buyer accepts and actually receives the goods, an authority says, "this provision is not complied with unless two things occur: The buyer must accept, and he must actually receive part of the goods, and the contract will not be good unless he does both."[341] The question is generally one of fact as to whether under the circumstances the goods were actually received and accepted, which question is for the jury under the direction of the court as to what will, in law, amount to such within the terms of the statute.[342] To constitute a delivery and acceptance, such as the statute requires, something more than mere words is necessary.[343] Superadded to the language of the contract, there must be some act of the parties amounting to a transfer of the possession and an acceptance thereof by the buyer.[344] By the decisions in the United States, there must be acts of such a character as to place the property unequivocally within the power and under the exclusive dominion of the buyer as absolute owner discharged of all lien for the price.[345]

An acceptance, however, sufficient to satisfy the statute, may be inferred from the acts of the buyer in exercising dominion over the goods as owner, although he may not be precluded from returning the same on the ground that they were of inferior quality.[346] By the English decisions, there must be such a dealing with the goods as amounts to a recognition of the contract.[347]

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[338] 128 Mass. 388 (1880).
[339] 41 Me. 523 (1856).
[340] 118 Mass. 279 (1875).
[341] Blackb. S., Sec. 1.,* p. 16.
[342] 42 Iowa 647 (1876).
[343] 120 Mass. 219 (1876); 124 U. S. 38 (1887).
[344] 1 Beach Cont., Sec. 559.
[345] 120 Mass. 309 (1876).
[346] 15 Ad. & Ell. (Eng.) N. S. 428 (1850).
[347] L. R. (1893) 2 Q. B. (Eng.) 65

Acceptance and receipt of a part only of the goods will satisfy the statute; and it is immaterial whether the part received be large or small.[348] The acceptance of a sample of the goods will be sufficient, provided that by the terms of the sale the sample be treated as part of the bulk of the goods; where, however, the sample is only taken for inspection and is not part of the goods bargained for, its acceptance will not satisfy the statute.[349]

Where the goods are bulky, or so situated as to render immediate actual delivery inconvenient, a constructive delivery will be sufficient, provided the buyer have taken actual or constructive possession of them as owner.[350] The general rule is that it is for the jury to find, from all the facts and circumstance of the case, whether or not the acts of the purchaser amount to receipt and acceptance, and any acts, conduct, or declarations of the parties, indicative of ownership by the vendee, may be given in evidence for the purpose of showing the same.[351]

84. Validity is given to a parol contract, within the seventeenth section of the statute, where the purchaser gives something in earnest to bind the bargain or in part payment.[352] **Earnest** is the giving of a pledge by one of the parties to signify the conclusion of a contract. The practice is one of great antiquity and general prevalence, but, like other ceremonial acts in the law, has fallen into disuse in modern times and the tendency is to regard the word as used in the statute of frauds, as for all practical purposes equivalent to part payment. Earnest must be money or money's worth; in other words, something of value.[353] And it must be actually paid; mere "crossing the hand" is not sufficient.[354]

As to part payment, the mere agreement to pay or credit a sum of money, without actual crediting or payment, is not sufficient to satisfy the statute; nor will a mere tender of a

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348 1 Allen (Mass.) 422 (1861).
349 Hollingsw. Cont., p. 113.
350 12 Mass. 300 (1815).
351 96 U. S. 557 (1877).
352 2 Kent's Comm., *p. 495, note; L. R. 27 Ch. D. (Eng.) 89 (1884).
353 108 Mass. 54 (1871).
354 7 Taunt. (Eng.) 597 (1817).

sum be sufficient.[355] The part payment required does not insist on the actual passing of money from the vendee.[356] But it must be of value—money's worth—and it must be agreed by both parties at the time that the value is then actually passed from the vendee to the vendor—that it is then a present payment. It is not enough for the parties to agree that it shall be applied as payment; that would be merely an agreement to pay. It must not rest in agreement—it must be paid down. The giving of a check is not absolute payment, but, when received as such and afterwards paid, it becomes a valid payment as of the time when it was given.[357]

85. The Memorandum.—Both the fourth and seventeenth sections of the statute of frauds require some memorandum in writing of the bargain. The requirements of the two sections are in this particular substantially alike and may be considered together.

In the first place, the statute relates to oral contracts only; written contracts are not affected by its provisions. The rules governing the memorandum of unwritten agreements required by the statute have no reference to written contracts. The note or memorandum of the oral contract, which the statute requires, is some writing authenticated by the signature of the party to be charged upon the contract, or of his agent, and containing, either in terms or by incorporation of other writing referred to in it, a statement of the terms of the contract and the parties to it.[358]

The memorandum is not the contract, but merely written evidence of the contract. If there be in writing an admission, by the party to be charged, of the bargain having been made, the requirement is satisfied. The memorandum may be sufficient, although very informal. A letter or series of letters,[359] a receipt for money,[360] an account stated,[361] a bill of parcels, the bought-and-sold notes of a broker;[362] in

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355 12 Barb. (N. Y.) 570 (1850); 41 Vt. 676 (1869).
356 37 Vt. 108 (1864).
357 17 Hun (N. Y.) 135 (1879).
358 Bro. St. Fr. (5th Ed.), Secs. 344, 345 *a*.
359 L. R. 1 C. P. (Eng.) 1 (1865).
360 95 U. S. 444 (1877).
361 1 Pet. (U. S.) 640 (1828).
362 149 U S. 481 (1892).

fact, any note or memorandum in writing which furnishes evidence of a complete and practicable agreement is sufficient under the statute; but the memorandum must contain the essential terms of the contract expressed with such a degree of certainty that it may be understood without recourse to parol evidence.[363] It must be signed before the action is brought.[364]

86. The memorandum should contain the name of the party with whom the contract is made, or a reference to him sufficient to identify him,[365] and should be signed by the party to be charged or his authorized agent,[366] and need only be signed by him. In cases of sales by auction, the entry of the purchaser's name in the sales book completes the memorandum, if the sales book properly state the subject-matter and terms of sale.[367] The purchaser by bidding, according to the custom of auctions, constitutes the auctioneer his agent to sign his name.[368]

The place of the signature is wholly immaterial. It makes no difference in what part of the instrument the name of the party to be charged appears, if it be put there by him or by his authority. It may appear at the top, middle, or bottom of the note or memorandum.[369] A signature by the party's mark or initials is sufficient. So, too, a printed or stamped signature will do, if the printed name be adopted and recognized by the party as his.[370]

The signature may be by the agent, who may write his own name instead of his principal's; but he must have authority to sign or his conduct must be ratified.[371] Neither party, however, can be the other's agent to bind him for signing the memorandum;[372] but brokers may bind both the buyer and seller between whom they complete a bargain by their bought-and-sold notes, where they correspond.[373]

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363 Bro. St. Fr. (5th Ed.), Sec. 371.
364 9 M. & W. (Eng.) 36 (1841).
365 99 U. S. 100 (1878); 149 U. S. 481 (1892).
366 L. R. 6 Q. B. (Eng.) 720 (1871).
367 2 Cush. (Mass.) 355 (1848).
368 L. R. 9 Q. B. (Eng.) 210 (1874).
369 58 Md. 546 (1882).
370 2 M. & S. (Eng.) 286 (1814).
371 9 Leigh (Va.) 387 (1838).
372 5 B. & Ald. (Eng.) 333 (1822).
373 76 Ala. 247 (1884); 6 Eng. L. & Eq. R. 286 (1851).

87. In England, it was decided in the leading case that the memorandum referred to in the fourth section of the statute of frauds must contain a statement of the consideration for the promise.[374] The word *agreement*, it was thought, was not satisfied unless there was a consideration, which ought, therefore, to be shown. This decision has been followed and accepted in England as unquestioned law. By statute, however, in a memorandum of guaranty, the consideration need not appear.[375]

In the United States, there has been a great diversity of opinion upon the doctrine, each state taking its own view of the matter. Massachusetts took the lead in opposition to this rule,[376] but it has received support in other jurisdictions.[377] In many states, this is a matter of statutory regulation, some requiring a statement of the consideration and others providing that it need not be stated.[378] It is generally held, that the consideration is sufficiently expressed by the use of the words *for value received*.[379]

Under the seventeenth section of the statute of frauds, the rule has not been laid down so broadly as in the leading case before mentioned. Where the contract of sale contains a stipulation as to price, the price agreed upon must appear in the memorandum, but, if no price be agreed upon, the memorandum may be silent on that subject.[380]

88. Where a contract within the statute has been put in writing and subsequently altered by parol agreement, the plaintiff in a suit on the contract cannot prove the modified agreement as engrafted upon the original contract.[381] There is a conflict of decisions as to whether a defendant may, in an action on a contract within the statute, set up performance in accordance with a subsequent verbal agreement. The best authority is that he cannot.[382]

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374 5 East (Eng.) 10 (1804).
375 19 & 20 Vict., c. 97.
376 17 Mass. 122 (1821).
377 97 N. Y. 230 (1884).
378 Stimson's Am. Stat. Law, Sec. 4,142.
379 34 Minn. 307 (1885).
380 Bro. St. Fr. (5th Ed.), Sec. 376.
381 30 Vt. 616 (1858); 40 Minn. 196 (1889); 14 Pa. 308 (1850).
382 L. R. 10 C. P. (Eng.) 598 (1875); 69 Wis. 43 (1887).

While parol evidence is inadmissible to contradict or vary the terms of the memorandum, it is competent to show by oral evidence the situation of the parties and the surrounding circumstances under which the agreement was made, in order to apply the contract to the subject-matter.[383]

It is settled that when a person pays money or performs services for another upon a contract unenforceable under the statute of frauds, he may recover the money in an action for money paid or for services rendered.[384] But, in such cases, the suit is brought, not on the unenforceable contract, but on the implied promise.

89. Equitable Relief Against the Effect of the Statute. — Courts of equity, while frequently affirming the doctrine that they are as much bound by the statute of frauds as courts of law, and while refusing to consider the mere moral wrong involved in repudiating such a contract, have nevertheless under their general equitable powers interfered in many cases where the statute was used by a party to cover the perpetration of actual fraud.[385]

Courts of equity have also intervened to enforce such a contract, notwithstanding the statute, where one of the parties has done acts in part performance of the contract in good faith, and where a refusal to complete the execution of the contract would result in the infliction of unjust and unconscientious injury and loss.[386]

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[383] 167 Mass. 426 (1897).
[384] 116 U. S. 491 (1886).
[385] 1 P. Wms. (Eng.) 620 (1720); and cases cited in Bro. St. Fr. (5th Ed.), Sec. 439.
[386] 102 Mass. 24 (1869).

THE LAW OF CONTRACTS

(PART 5)

INTERPRETATION OF CONTRACTS

1. Where there is a dispute as to the terms of a contract made by word of mouth, it is necessary in the first instance to ascertain what was said, and the circumstances under which the alleged contract was formed. These are questions of fact to be determined by a jury.[1] The same is true of a written agreement. It must first be proved according to the rules of evidence; when proved, its legal effect is a question of construction for the court.[2] The construction of all written instruments belongs to the court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury;[3] and it is the duty of the jury to take the construction from the court either absolutely, if there be no words of art or phrases used in commerce and no surrounding circumstances to be ascertained, or conditionally, when these words or circumstances are necessarily referred to them.[4]

Moreover, the obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made. These are necessarily implied in all contracts and form a part of them as the measure of the obligation assumed by one party and the right acquired by the other.[5]

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[1] Ans. Cont. (8th Ed.), p. 314.
[2] 6 Fed. Rep. 856 (1881).
[3] 165 Mass. 473 (1896).
[4] 8 M. & W. (Eng.) 806 (1841); 52 Fed. Rep. 354 (1892); 82 N. C. 249 (1880).
[5] 2 How. (U. S.) 608 (1844).

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GENERAL RULES OF CONSTRUCTION

INTENTION OF PARTIES

2. The most important rule of construction is that a contract is to be so interpreted, if possible, as to carry into effect the intention of the parties.[6] Greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent. But the parties are bound by the words they have used which are to be understood in their plain literal meaning; they are not suffered to plead ignorance of the effect of the language of their own agreement.[7] Men will be taken to have meant precisely what they have said, unless from the whole tenor of the instrument a definite meaning can be collected which gives a broader interpretation to specific words than their literal meaning would bear.[8]

A contract is to be understood by the language employed therein, not according to the views of its meaning entertained or alleged to have been entertained by one of the parties, the language of the contract being the best if not the only legitimate evidence of what the parties understood and intended.[9] And while the writing may be read in the light of surrounding circumstances to more perfectly ascertain the intention of the parties, it is, nevertheless, the visible expression of their meaning and is neither to be contradicted nor explained away.[10]

3. Mode of Determining Intention.—As the main object of construction is to arrive at the intention of the parties, this intention is to be ascertained from the whole instrument, not from particular words and phrases without references to the context;[11] and the instrument shall operate according to the intention, unless it be contrary to law.[12] Where the meaning is doubtful, the circumstances at the

[6] 16 Pet. (U. S.) 528 (1842).
[7] Bish. Cont., Sec. 381; Ans. Cont. (8th Ed.), p. 327; 67 Me. 163 (1878).
[8] Ans. Cont. (8th Ed.), p. 327.
[9] 43 Iowa 439 (1876); 58 Conn. 39 (1889).
[10] 1 Greenl. Ev., Sec. 277.
[11] 11 Vt. 583 (1839).
[12] 14 Ad. & Ell. N. S. (Eng.) 891 (1850); 9 Pick. (Mass.) 422 (1830).

making of the instrument, and the subsequent acts of the parties, are to be considered in determining the sense of the words used.[13] For when the language of a contract is ambiguous or susceptible of two meanings, the court will infer the intention of the parties from the circumstances attending the transaction, so far as they throw any light on the language used;[14] and the manner in which the parties have dealt with and treated the subject-matter, and the construction they have placed on the instrument with the actual or presumed knowledge or assent of each other, often have an important bearing on the subject.[15]

Moreover, the courts will endeavor to give a reasonable construction to the agreement; and, therefore, in seeking for the intent of the parties, the fact that a construction contended for would make the contract unreasonable, and place one of the parties at the mercy of the other, may be properly taken into consideration.[16]

The construction of a contract should be, when possible, in favor of its legality.[17] The law does not assume an intention to violate the law, nor will an agreement be adjudged to be illegal where it is capable of a construction which will uphold it and make it valid.[18] So, also, a contract should be construed in that sense in which it will have some effect, rather than in that sense in which it can have none, for the rule is that a contract should be supported and made effectual, rather than defeated, where this can be done by a fair and rational construction of the language used.[19]

4. Another rule of the common law, originally applied to deeds, is that in cases of doubt, all instruments should be construed against the promisor or obligor, for the reason that the party who makes the instrument should take care to express his liability so as not to be bound beyond what it was his intention he should be.[20]

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13 112 Pa. 442 (1886).
14 107 U. S. 437 (1882).
15 89 Wis. 612 (1895).
16 166 N. Y. 77 (1901).
17 163 N. Y. 437 (1900).
18 86 N. Y. 384 (1881).
19 11 Am. Dig. (Cent. Ed.), p. 726, and cases therein cited; Cowp. (Eng.) 714 (1777); 118 Ill. 17 (1886); 2 Pars. Cont.,* p. 506.
20 6 M. & W. (Eng.) 605 (1840).

Grants of the sovereign are, however, an exception, being construed in his favor;[21] and, generally, contracts in favor of the public are to be construed liberally in its favor where the subject-matter concerns its interests.[22] A strict construction in favor of the sovereign is not applicable where the grant is for valuable consideration; in such case, the rule of construction between the government and the subject is the same as between private grantors and grantees.[23]

While the rule that a contract is to be construed most strongly against the promisor has been frequently applied, particularly in the case of insurance policies,[24] it is one that has not met with much favor, and is admittedly the last to be resorted to and is to be applied only where other means of interpretation fail. The modern and more reasonable practice is to give the language its just sense, and to search for the precise meaning—a meaning that is requisite to give due and fair effect to the contract, without adopting either the rule of a rigid or of an indulgent construction.[25]

LANGUAGE OF THE INSTRUMENT

5. In construing a contract, the words are to be taken in their plain, ordinary, and common acceptation,[26] unless they have, in respect to the subject-matter, as by the known usage of a trade or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently point out that they must, in the particular instance and in order to effectuate the immediate intention of the parties to that contract, be understood in some other and peculiar sense.[27]

The parties have a right to attach an unusual or arbitrary meaning to their words, but to accomplish such a purpose and to vary the common understanding, the meaning should be plain, unambiguous, and free from reasonable doubt.[28]

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[21] 6 B. & S. (Eng.) 283 (1865).
[22] 2 B. & Ad. (Eng.) 792 (1831); 138 U. S. 1 (1890).
[23] 93 N. Y. 129 (1883).
[24] 170 U. S. 144 (1897).
[25] 2 Kent's Comm., *p. 557.
[26] 21 Ill. 570 (1859); 59 Vt. 139 (1887).
[27] 103 N. Y. 341 (1886); 1 Cliff. (U. S.) 55 (1858); 4 East (Eng.) 130 (1803); L. R. (1895) 1 Q. B. Div. (Eng.) 749.
[28] 42 Md. 498 (1875); 30 Cal. 344 (1866).

Words, however, which are purely technical or local, that is, not in familiar use, but employed only in a particular science or trade, may be interpreted according to their technical use,[29] unless the intention be apparent not to use the words in their technical sense, when the purpose of the makers of the instrument will control. This is true even where legal terms are used.[30] Legal terms should usually be given their definite legal signification, but the mere use of technical words and phrases which have such a signification cannot be allowed to defeat the contrary intention of the parties, if that intention be manifest from the whole contract.[31]

In construing a contract, every word and clause is to be taken into consideration and have an effect given to it, if possible.[32] Where there are two clauses apparently repugnant, if they can be reconciled by any reasonable construction, that construction must be given.[33] A word, not plainly inserted by accident or mistake, is never to be thrown out entirely, while there is a plain and natural construction which can be given to it, not manifestly destructive to the general intent of the sentence.[34]

While it is highly desirable that contracts should be accurate in their language and conform to the rules of grammar, and while they will generally be construed according to the rules of grammar, the rule is not an absolute one. Inasmuch as the first object of the court will be to give effect to the true purposes of the contract,[35] mere verbal slips and grammatical inaccuracies will be corrected in the light of the manifest intention of the parties.[36] Effect will be given to the intent when properly ascertained, however clumsily the instrument is worded, regardless of a violation of the strict rules of grammatical construction.[37]

6. The **punctuation** in a contract may be looked to for aid in ascertaining its true meaning, but the instrument may

29 42 Fed. Rep. 198 (1890); 165 Pa. 542 (1895).
30 57 U. S. App. 526 (1898).
31 58 Fed. Rep. 437 (1893); 177 Pa. 387 (1896).
32 10 Pick. (Mass.) 228 (1830).
33 90 N. Y. 430 (1882).
34 133 Pa. 134 (1890), at p. 140.
35 157 Ill. 605 (1895).
36 53 Minn. 42 (1893).
37 36 N. J. Law 432 (1872); 1 Wend. (N.Y.) 388 (1828); 48 Cal. 239 (1874).

be read and interpreted without such aid.[38] The want of proper punctuation has no more effect in vitiating a contract than bad grammar. "Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to, when all other means fail; but the court will first take the instrument by its four corners, in order to ascertain its true meaning; if that be apparent on judicially inspecting the whole, the punctuation will not be suffered to change it."[39]

7. Where an instrument is partly written and partly printed, it is held that the written parts shall have the greater weight, because it is presumed that greater attention was given the written parts, the printed form being intended for general use without reference to particular objects and aims, while that which is written is supposed to be dictated by the particular purpose and intention of the contracting parties.[40] But it is the duty of the court, in endeavoring to arrive at a proper interpretation, to examine the whole instrument and to strive to give some operation to each clause and to reconcile apparent discrepancies.[41] It is not to be supposed that parties intended to insert in their contract provisions that are incompatible; and a construction that would lead to such results is to be avoided if possible.[42]

SUMMARY

8. The two rules pointed out by an authority, namely, (1) words are to be understood in their plain and literal meaning, and (2) an agreement should receive that construction which will best effectuate the intention of the parties to be collected from the whole of the agreement,[43] might seem to be in conflict. But the substantial result is that where the language is clear and unequivocal, the contract is to be interpreted by its own language, and courts are not at liberty to look at extrinsic circumstances surrounding the transaction, or elsewhere, for reasons to ascertain its

[38] 33 Pa. 186 (1859).
[39] 11 Pet. (U. S.) 41 (1837), by Baldwin, J.
[40] L. R. 7 Q. B. (Eng.) 580 (1872).
[41] 79 Ala. 63 (1885).
[42] 90 N. Y. 430 (1882).
[43] Ans. Cont. (8th Ed.), p. 327.

intent; the understanding of the parties must be deemed to be that which their own written agreement declares.[44] But where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the real meaning of the language used must be investigated and ascertained.[45] To do this the court may put itself in the place of the contracting parties, and then, in view of all the facts and circumstances surrounding them at the time of the execution of the instrument, consider what they intended by the terms of their contract; and when the intention is manifest, it will control in the interpretation of the instrument regardless of inapt expressions and technical rules of construction.[46]

CUSTOM AND USAGE

9. Customary incidents universally attaching to the subject-matter of the contract in the place where it was made are *prima facie* presumed to have been contemplated by the parties and impliedly annexed to the written stipulations. Evidence, therefore, may be given of a custom, or usage, of trade to explain or interpret the true intention of the parties, although not to negative, enlarge, or abridge the force of their express agreement.[47] In commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent.[48] The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages.[49]

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[44] 161 N. Y. 1 (1899).
[45] 9 Cl. & Fin. (Eng.) 355 (1842), at p. 566.
[46] 27 U. S. App. 364 (1894); 86 Fed. Rep. 235 (1898); 76 Fed. Rep. 909 (1896).
[47] Add. Cont. (9th Ed.), p. 65; 61 Pa. 107 (1869).
[48] 1 H. & C. (Eng.) 123 (1862).
[49] 1 M. & W. (Eng.) 466 (1836).

At common law, a custom was not an established one unless it were shown to have existed from time immemorial; but the word *custom*, so used, is in the sense of a local common law, and has to do principally with the law of property;[50] such, for example, is the custom of **gavelkind**. When, however, we speak of a *custom of trade*, the word is practically synonymous with *usage*, and it is in this sense that the word is more frequently met with in the interpretation of contracts.[51]

10. Usage of trade is a course of dealing; a mode of conducting transactions of a particular kind. It is proved by witnesses testifying to its existence and uniformity from their own knowledge obtained by observation of what is practiced by themselves and others in the trade to which it relates.[52]

The proper office of a usage or custom in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence and contracted in reference to it.[53] Where a contract is silent as to details, custom and usage may be resorted to for the purpose of supplying such details, provided the incidents sought to be imported into the contract be not inconsistent with its express terms.[54]

The true test of a commercial usage is its having existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made in reference to it.[55]

Usage is a fact to be proved, not a matter of opinion, and must be shown by those who have observed the method of transacting the particular kind of business as conducted by

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[50] 23 Me. 90 (1843); 24 W. R. (Eng.) 603 (1876).

[51] Am. & Eng. Encyc. Law (1st Ed.), Vol. 27, p. 701.

[52] 115 Mass. 514 (1874); 72 Miss. 371 (1894); 65 Conn. 302 (1894).

[53] 10 Wall. (U. S.) 383 (1870).

[54] 23 Ore. 319 (1892).

[55] 137 U. S. 30 (1890).

themselves and others.[56] As a general rule, knowledge of a usage must be brought home to the party who is to be affected by it,[57] and a proper ground for inferring knowledge of such a usage would be from a similar previous course of dealing relative to the subject-matter between the same parties.[58]

The generally accepted doctrine is that parties are presumed to contract with knowledge of and reference to a custom or usage that is universal, certain, notorious, and has long continued, pertaining to the subject of their agreement. But where the usage is special and confined to a particular business, trade, or locality, such presumption is not conclusive and may be rebutted by proof upon the part of one of the contracting parties that he was ignorant of the usage.[59]

11. It is well settled that usage cannot be allowed to subvert the settled rules of law. If, therefore, on a given state of facts, the rights and liabilities of the parties to the contract be fixed by the general principles of law or by statute, they cannot be changed by any local custom of the place where the contract was made.[60]

Further, a custom or usage must not be unreasonable.[61] If a usage lead to consequences which are absurd or mischievous, a court of law will not enforce it, however well known; the presumption that it was intended to be adopted as part of the contract is repelled.[62] Proof of the existence of a general custom furnishes some reason why a court should not condemn it as unreasonable, except upon full inquiry and for good reasons; for, if it were unreasonable, it is not probable that prudent men would permit its continuance.[63] "When a considerable number of men of business carry on one side of a particular business, they are apt to set up a custom which acts very much in favor of

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56 139 Mass. 399 (1885); 149 N. Y. 307 (1896).
57 2 Pars. Cont., *p. 544.
58 156 Mass. 331 (1892); 167 Pa. 382 (1895).
59 49 N. Y. 464 (1872); 6 Fed. Rep. 581 (1881); 26 Fed. Rep. 642 (1886); 92 Iowa 371 (1894); 54 Fed. Rep. 839 (1893); 35 Neb. 554 (1892).
60 113 Pa. 431 (1886).
61 1 Black. Comm. 77.
62 10 Allen (Mass.) 305 (1865); 50 Minn. 53 (1892).
63 14 Ill. App. 355 (1883).

their side of the business. So long as they do not infringe some fundamental principle of right and wrong, they may establish such a custom; but if, on dispute before a legal forum, it be found that they are endeavoring to enforce some rule of conduct, which is so entirely in favor of their side that it is fundamentally unjust to the other side, the courts have always determined that such a custom, if sought to be enforced against a person in fact ignorant of it, is unreasonable, contrary to law, and void."[64]

Whether a usage be unreasonable or otherwise is a question of law for the court.[65] A custom or usage cannot be set up to contradict the clear intention of the parties, or to vary the positive stipulations of a written contract.[66] "An express contract is always admissible to supersede, or vary, or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom."[67] Indeed, it is said that the tendency to establish local and limited usages and customs in the contracts of parties has gone quite as far as sound policy can justify,[68] and the tendency of courts of law is to apply the rules regulating the competency of usages to explain and interpret the language of written instruments with great strictness, and to guard more carefully against the danger of permitting extrinsic evidence to vary or control the words which the parties have deliberately adopted.[69]

WHAT LAW GOVERNS

12. Where one or more of the parties to a contract enter into the same in a foreign country, or if the contract come into litigation before a foreign tribunal, what construction shall be given to it and the obligations it imposes? Where there is a conflict of laws, what law shall govern? This is a

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[64] L. R. 7 H. L. (Eng.) 802 (1875), at p. 818, by Brett, J.

[65] 4 Mich. 336 (1856); 87 Ill. 547 (1877).

[66] 159 Mass. 522 (1893).

[67] 2 Sumn. (U. S.) 567 (1837), by Justice Story.

[68] 15 Wall. (U. S.) 573 (1872).

[69] 10 Allen (Mass.) 305 (1865); 101 Ala. 446 (1894); 17 R. I. 464 (1891).

subject of wide extent involving many difficult questions that are still unsettled. Its full treatment constitutes the subject of private international law, and only a few of the more general rules will be briefly mentioned here.[70]

The common law of England has left many of these questions unsettled, but the expansion of commerce in modern times has given the subject great importance, especially in the United States, composed as it is of many sovereign commonwealths, each legislating for itself alone. The most general maxim of international jurisprudence is that every nation possesses an exclusive sovereignty and jurisdiction within its own territory,[71] with the consequent power to bind directly all property, real or personal, within its territory, all persons resident within it, whether citizens or aliens, and all acts done within it.[72] The extent of the recognition given to foreign laws depends entirely upon comity, of which every nation must be the final judge for itself.[73]

In connection with this subject there are four Latin phrases commonly used, namely:[74] *Lex loci contractus*, the law of the place of the contract, that is, the law of the place where the contract was made; *lex domicilli*, the law of the domicil, for in law every person has a home, or domicil;[75] *lex loci rei sitae*, the law of the place where a thing is situated; and *lex fori*, the law of the forum, that is, the law of the court or tribunal where a legal remedy is sought.

13. Lex Loci Contractus.—The general rule is that contracts, as to their nature, validity, and interpretation, are to be governed by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view.[76]

The parties to a contract are either the subjects of the power ruling at the place of the contract, or, as temporary residents, owe it a temporary allegiance. In either case, they must be understood as submitting to the law there

70 Story Confl. L.
71 *Ibid.*, p. 21, Sec. 18.
72 L. R. 6 Q. B. (Eng.) 139, 155 (1870).
73 See *The Law in General:* Conflict of Laws.
74 Black's Law Dict.
75 23 Pick. (Mass.) 170 (1839).
76 129 U. S. 397 (1889).

prevailing and agreeing to its action upon their contract. It is immaterial that such agreement is not expressed in terms; it is equally an agreement, in fact presumed lawful, and a foreign court interpreting or enforcing it on any contrary rule defeats the intention of the parties as well as neglects to observe the recognized comity of nations.[77]

The validity of a contract, therefore, as regards the capacity of the parties, the formalities attending execution, and its interpretation, depends on the law of the place where it is made.[78] An exception to this rule is that no state is bound to recognize or enforce any contract which is injurious to its own interests or to those of its own citizens, or which is in fraud of its laws, or opposed to its public or national institutions, although it may be valid by the laws of the place where it is made.[79] No community is obliged to permit comity to interfere with its domestic interests and policy.[80]

14. All contracts made in one country concerning real estate or immovable property situated in another country must be interpreted according to the law of the country where the property is situated.[81] All authorities, both in England and in the United States, fully recognize the principle that real estate is exclusively subject to the *lex loci rei sitae*, and not to the *lex loci contractus*.[82] The validity, as well as the form, of any instrument of transfer of real estate, whether by deed or will, is to be determined by the *lex loci rei sitae*.[83]

15. There is often difficulty in determining just where a contract is made. Where a contract is the result of correspondence between parties in different countries, it is held that the place where the final assent is given by one party to the offer of the other is the place of contract.[84] Thus, a contract of guaranty signed in Massachusetts and sent by

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[77] 8 Moo. P. C. Cas. N. S. (Eng.) 272, 290 (1865).
[78] 2 Kent's Comm. (14th Ed.), p. 459; 125 Mass. 374 (1878); 91 U. S. 406 (1875).
[79] 160 Mass. 356 (1893); Story Confl. L., Sec. 244; 28 N. H. 379 (1854).
[80] 2 Kent's Comm. 457.
[81] Add. Cont. (9th Ed.), p. 55.
[82] L. R. 10 Q. B. Div. (Eng.) 403 (1883); 96 U. S. 627 (1877).
[83] 129 Mass. 243 (1880).
[84] 15 R. I. 380 (1886).

mail to Maine, and there accepted and acted on by a delivery of goods to a carrier for the purchaser, was held to have been made in Maine.[85] Questions of difficulty arise where a contract is made in one state to be performed or partially performed in another. *Prima facie* such a contract is to be construed and enforced according to the *lex loci contractus;* if no place of performance be designated expressly or impliedly, the law of the place where it was made governs.[86] But if from the terms or nature of the contract it appear that the parties expressly agreed upon performance in another state, then the court will look at the circumstances to ascertain by what law the parties intended the contract to be governed and will enforce the contract accordingly.[87] Thus, if a sum be expressly made payable at a place other than where the contract was made, it would seem that the law of the place of payment or performance would apply, the fundamental principle being admitted that in every forum a contract is to be interpreted by the law with a view to which it was made.[88] "The law of the place can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it shall be interpreted."[89] This exception to the application of the *lex loci* is more embarrassed than any other branch of the subject by distinctions and jarring decisions.[90]

In most cases, where a contract must be wholly performed abroad, the reasonable presumption may be that it is intended to be a foreign contract determined by foreign law; but this *prima facie* view is capable of being rebutted by the expressed or implied intention of the parties, as deduced from other circumstances.[91] Again, it may be that the contract is partly to be performed in one place and partly in another, in which case the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language

[85] 175 Mass. 374 (1878).
[86] Story Confl. L., Sec. 280; 84 N. Y. 367 (1881).
[87] 129 U. S. 397 (1889); 42 Ch. Div. (Eng.) 321 (1889).
[88] 67 Fed. Rep. 493 (1895); 142 U. S. 101 (1891); 106 U. S. 124 (1882).
[89] 2 Burr. (Eng.) 1,077 (1766), by Lord Mansfield.
[90] 2 Kent's Comm. (14th Ed.) 459.
[91] L. R. 12 Q. B. Div. (Eng.) 589 (1884); L. R. (1894) App. Cas. (Eng.) 202.

of the contract itself, with a view to discovering from it the true intention of the parties.[92]

16. Lex Fori.—Upon the principle of comity, and for the purpose of facilitating international intercourse, and within limits fixed by its own public policy, a civilized state is accustomed to give effect to a foreign law which by the act and will of the parties has become part of their agreement. But in doing so, the state, nevertheless, adheres to its own system of formal judicial procedure and remedies. Thus, the distinction is at once established between the law of the contract, which may be foreign, and the law of the procedure and remedy, which must be domestic and local. In respect to the latter, the foreign law is rejected, but how and where to draw the line of precise classification is not always easy to determine.[93]

The principle is that whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation and affects the rights of the parties, as growing out of the contract itself or inhering in it or attaching to it, is governed by the law of the contract.[94]

The law of the forum determines the form of the action, as to whether it shall be assumpsit, covenant, or debt.[95] It regulates all process, controls the admission of evidence, and prescribes the modes of proof by which the terms of the contract are made known to the court.[96] So, also, the proper matter of set-off must be determined by the laws of the state where the action is brought.

In the same manner it has been held that a contract valid by the laws of the place where it was made, although not in writing, will not be enforced in the courts of a country where the statute of frauds requires a written memorandum.[97] The

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[92] Story Confl. L., Sec. 314.
[93] 106 U. S. 124 (1882).
[94] *Ibid.*
[95] 5 Johns. (N. Y.) 239 (1810); 8 How. (U. S.) 451 (1850); 4 Wall. (U. S.) 535 (1866).
[96] 115 Mass. 304 (1874); 3 Cl. & Fin. (Eng.) 544 (1835).
[97] 12 C. B. (Eng.) 801 (1852); 163 Mass 326 (1895).

statute of limitations has also been held to belong merely to the *lex fori*, and, as a defense, is governed by the law of the forum, as being a matter of procedure.[98] A discharge of a contract by the law of the place where it is made is generally a discharge elsewhere,[99] but there are exceptions to the rule which every country enforces at its discretion, in accordance with its own public policy and the right and duty of self-protection against unjust foreign legislation.[100] Under the constitution of the United States, prohibiting states from passing laws impairing the obligation of contracts, a discharge under the insolvent laws of the place where a contract was made will not operate as a discharge of a contract made with a citizen of another state not a party to the insolvency proceedings.[101]

17. The law of nations recognizes the right of disposition as an essential incident of the ownership of personal property, and wherever such property is located, it is generally agreed that the title to it follows the domicil of the owner.[102] A conveyance of it, valid according to the law of the place of contract, is ordinarily binding and effectual to pass title to personal property wherever situated.[103] This principle is applicable to voluntary assignments for the benefit of creditors, which is a personal right possessed by every owner of property, and is as operative upon personal property situated in a foreign state as it is upon property located in the state where it is executed, unless repugnant to the positive law or declared policy of such foreign state.[104] But this principle does not apply to involuntary transfers by process of law; the latter are generally held inoperative upon property not situated within the territory over which the laws that make them, or compel the debtor to make them, have dominion.[105]

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98 2 Mas. (U. S.) 151 (1820); 44 N. H. 306 (1862).
99 106 U. S. 124 (1882).
100 Story Confl. L., Secs. 332, 337, 341.
101 26 Vt. 698 (1854); 1 Wall. (U. S.) 223 (1863); 128 U. S. 489 (1888).
102 58 Conn. 319 (1890).
103 58 Fed. Rep. 672 (1893).
104 104 Pa. 381 (1883); 147 U. S. 476 (1892); 96 N. Y. 248 (1884).
105 2 Kent's Comm., *p. 405.

DISCHARGE OF CONTRACTS

18. A contract is discharged when the legal relations which it created have ceased to exist.[1] The ways in which the contractual tie may be loosed and the parties wholly freed from their rights and liabilities under the contract are, by mutual *agreement;* by *operation of law;* by *performance;* or, there may be a *breach* of contract.[2]

BY AGREEMENT OF THE PARTIES

WAIVER AND RESCISSION

19. While a contract is still executory, the parties may, by mutual agreement, annul the same or abandon performance thereof; they have the same right to unmake as they had originally to make the agreement.[3] To annul or set aside a contract fairly made requires the consent of both parties to it; there must be the same meeting of minds, the same agreement to modify or abandon it that was necessary to make it.[4]

An agreement to abandon or terminate a contract may be evidenced by acts as well as by words. If the conduct of the parties be such as to show a mutual understanding that the contract is dissolved, the contract is destroyed, and all rights under it fall with it.[5] An executory written contract may be rescinded or abandoned by parol, and the agreement to rescind may be inferred from the acts and declarations of the parties, but such acts must be clear and unequivocal.[6]

Generally, where one party to a contract assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares

[1] Am. & Eng. Encyc. Law (1st Ed.), Vol. 3, p. 889.
[2] Ans. Cont. (8th Ed.), p. 332.
[3] 9 Mass. 78 (1812); 12 Vt. 625 (1839).
[4] 103 Ill. 115 (1882); 115 U. S. 29 (1885).
[5] 35 S. C. 610 (1891).
[6] 94 Mo. 388 (1888).

his intention then and there to rescind.[7] The other party may elect to adopt such renunciation of it by so acting as, in effect, to declare that he, too, treats the contract as at an end;[8] or he may elect to keep it in force and hold the other party to the obligation.[9]

While the contract is *executory*, the mutual agreements of the parties to rescind it constitute a sufficient consideration as to each for the rescission, but where the contract has been *executed* on one side, the obligation cannot be discharged except by performance, a formal release under seal, or an accord and satisfaction.[10] So far as the contract remains executory and before breach, it may be annulled by agreement of all the parties; but when it has been broken and a right of action has accrued, the debt or damages can only be released for a consideration; and even so far as it remains executory, the agreement to annul on the one side may be taken as the consideration for the agreement to annul on the other side.[11]

MODIFICATION

20. The parties to a contract still executory may, by mutual agreement, discharge each other from the reciprocal obligations thereunder, and either modify or qualify the terms of the old agreement or substitute a new and different agreement in the place thereof.[12] The new agreement may expressly provide for an annulment of the original contract, or it may imply an annulment by the introduction of new terms clearly and positively inconsistent with the old.[13] While the contract is wholly executory and not performed in whole or in part by either side, the parties may, without a new consideration other than the mutual acquittance of each other from the old promise, substitute a new agreement.[14] The mutual unexecuted undertakings of the existing contract

7 98 Pa. 541 (1881).
8 107 N. Y. 674 (1887); 157 Mass. 113 (1892); L. R. 16 Q. B. Div. (Eng.) 460 (1886); see *subtitle* By Breach *infra*.
9 130 N. Y. 354 (1891).
10 115 U. S. 29, 34 (1885); 156 Pa. 276 (1893); 7 Iowa 232 (1858).
11 149 Mass. 271 (1889); 9 R. I. 90 (1868).
12 95 Pa. 483 (1880).
13 119 N. Y. 1 (1890); 8 C. B. N. S. (Eng.) 831 (1860).
14 117 N. C. 287 (1895); 75 Wis. 631 (1890).

are a sufficient consideration for the cancelation of such a contract and the substitution of a new one with different terms.[15] It will be immaterial if, for a moment, there be technically a breach by one of the parties, since by the new agreement both treat the old one as an existing contract, and mutually agree to rescind it and waive the breach.[16] Where, however, a contract has been fully executed, a subsequent modification, without a new consideration to support it, is a *nudum pactum*. Thus, an agreement to extend the time for the payment of a debt must be founded on a sufficient consideration.[17]

A contract may also be discharged by the substitution of new parties for the old ones. This generally occurs where several parties, mutually indebted to each other, by agreement among themselves substitute one debt in the place of the other.[18] We have already referred to this subject as constituting a *novation*.[19] It is only necessary to say here that the agreement of all the parties is absolutely essential to complete the novation;[20] that the general principles of consideration attach to the whole transaction and the original liability must be wholly extinguished, the new debtor contracting a new debt and the new creditor assuming the risk of the new debtor's solvency.[21]

21. Simple contracts, both written and unwritten, may be modified, changed, and rescinded by parol at any time after execution;[22] but where the contract is such as is required by the statute of frauds to be in writing, the majority of the decisions are to the effect that it cannot be *varied* by parol,[23] although it may be shown to have been discharged by parol.[24] As in most questions arising on this statute the decisions are conflicting.

At common law, a specialty could not be discharged or

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15 23 Ill. App. 656 (1887).
16 194 Pa. 475 (1900); 156 Mass. 581 (1892).
17 32 N. Y. Supp. 663 (1895).
18 Add. Cont. (9th Ed.), p. 162.
19 See *subtitles* Persons Not Parties, Novation, *supra*.
20 1 Pars. Cont., p. 220.
21 165 Mass. 81 (1895); 53 Vt. 469 (1881).
22 127 Ind. 168 (1890).
23 97 N. Y. 216 (1884); Bro. St. Fr., Sec. 411 *et seq*.
24 Bro. St. Fr., Sec. 429; 5 B. & Ad. (Eng.) 58 (1833); 13 Abb. N. Cas. (N. Y.) 340 (1883).

modified by parol,[25] the rule being that "every contract ought to be dissolved by matter of as high a nature as that which first made it obligatory."[26] The rule in equity was different. The form of the new agreement was discharged and, under the recent blending of the jurisdiction of law and equity in England, and the right given by the modern rules of procedure in the United States to interpose equitable defenses in legal actions, the common-law rule has lost its importance, and the ancient technical rule that a contract under seal could not be varied or discharged by a parol agreement is practically superseded.[27]

In New York, the technical distinction between a satisfaction before or after breach seems to have been disregarded, and a new agreement by parol followed by *actual performance* of the substituted agreement, whether made and executed before or after breach, is treated as a good accord and satisfaction of the covenant.[28] So, also, a new agreement, although without performance, if based on a good consideration, will be a satisfaction if accepted as such.[29]

SPECIAL PROVISION IN CONTRACT

22. A contract may contain special provisions for its own discharge under such circumstances as may be agreed upon by the parties.[30] Thus, it may be agreed that the nonfulfilment of a condition precedent, or the occurrence of a condition subsequent, or the exercise of an option to determine the contract, shall discharge the parties from all further liability. A common illustration is the case of the purchase of a horse, where the buyer pays the price but stipulates that, after a reasonable trial, if he should not be satisfied with the animal he may return him and receive the price paid.[31] Other illustrations are the case of a bailment of goods with the right to purchase in the bailee,[32] a bailment with the right to retain title to the chattel in the bailor

25 2 M. & G. (Eng.) 729 (1841).
26 Bro. Leg. Max. (7th Ed.) 884.
27 22 Q. B. Div. (Eng.) 537 (1889).
28 119 N. Y. 1 (1890); 101 U. S. 522 (1879).
29 188 Ill. 508 (1901).
30 Ans. Cont. (8th Ed.), p. 338.
31 73 Pa. 387 (1873); 155 Pa. 394 (1893).
32 150 U. S. 312 (1893).

until certain instalments of money are paid, and with the right in the bailor to retake the chattel if default be made in the payments.[33] So, also, provisions are generally inserted in insurance policies that the policy shall be void if, without the company's consent, the insured shall cause an increase in the risk.[34]

The parties may expressly stipulate in advance upon what contingency either party may be absolved from his obligation to perform; for example, in the familiar case of a contract with a *strike clause*, where there is an express exemption from liability to perform in case of a strike on the part of the employes of one of the contracting parties;[35] and in the excepted risks of a charter party, where the carrier is exonerated from liability from loss or damage resulting from perils of the sea.[36]

RELEASE

23. A **release** is the act or writing by which some claim or interest is surrendered to another person.[37] The term properly applies to the discharge of a claim, or a right of action arising from a breach of contract by formal consent or dispensation of the promisee.[38] While not strictly applicable to a discharge by agreement before breach, it is considered here for convenience, before treating of the subject of breach of contract itself.

A technical release, in order to be self-sustaining, should be under seal, and, if it be so, no consideration is necessary, the seal importing a consideration.[39] Where the release is not under seal, then a consideration must be shown to support it, otherwise it will be treated as a mere *nudum pactum*.[40]

24. No particular form of words is necessary to constitute a release;[41] any words which sufficiently denote the

[33] 165 Pa. 150 (1894).
[34] 145 Mass. 426 (1888).
[35] 10 L. R. A. (Tex.) 419 (1890); 58 N. Y. 573 (1874).
[36] L. R. 7 Q. B. (Eng.) 404 (1872); 153 U. S. 199 (1894).
[37] Anderson's Law Dict. 870.
[38] Beach Cont., Sec. 456; Leake Cont. (3d Ed.), p. 795.
[39] See *subtitle* Form of Contracts *supra*.
[40] See *subtitles* Authentication, Sealing, *supra*. L. R. 1 Ch. App. (Eng.) 48 (1865); 29 Kans. 657 (1883).
[41] 23 Pa. 447 (1854).

intention of one party to renounce and discharge his claim or demand will operate as a release, though it is best to make use of the customary words *remise*, *release*, *quitclaim*, *renounce*, and *acquit*.

25. An intention to release may sometimes be inferred from an unequivocal act of the creditor, such as the wilful destruction of the evidence of indebtedness,[42] or the delivery of the same to the debtor with intent thereby to cancel and discharge the debt.[43] But a mere promise, waiver, or voluntary declaration by a creditor of an intention to release a debtor will not amount to an actual release, unless accompanied by some act which amounts to a release at law.[44]

A general covenant not to sue at any time amounts to a release, but where the covenant is merely not to sue for a limited time, or not to sue one of several joint debtors, it cannot be pleaded as a defense in an action on the obligation, although the covenantee may have his remedy by an action on the covenant.[45]

26. A **general release** is a release of all demands and is the best release one can have, for by it every known cause of action existing at the release is taken away.[46] But a general release no longer has the extensive operation which it had by the ancient law, and, though a release be general in its terms, the court will limit its operations to the matters clearly contemplated by the parties at the time of the execution, and it may be limited in its effect by its recitals.[47] But where the release is general in its terms, and there is no limitation by way of recitals or otherwise, the releasor may not prove an exception by parol;[48] the instrument itself is the only competent evidence of the agreement of the parties, unless avoided for fraud, mistake, duress, or some like cause.[49]

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42 3 Wood. (U. S.) 19 (1876).
43 30 N. J. Eq. 265 (1878); 90 N. Y. 333 (1882).
44 153 Pa. 281 (1893).
45 21 Wend. (N. Y.) 424 (1839); 11 Ad. & Ell. N. S. (Eng.) 840 (1846); 45 N. J. Law 360 (1883); 17 Mass. 623 (1822).
46 Co. Litt. 291.
47 Add. Cont. (9th Ed.), p. 159; 6 H. & N. (Eng.) 336 (1861).
48 139 Mass. 43 (1885); L. R. 1 Q. B. (Eng.) 101 (1865).
49 135 N. Y. 182 (1892).

The general rule is that a technical release of one joint, or a joint and several, obligor is a release of all,[50] and was at one time strictly enforced. But the weight of authority now is in favor of giving effect to the intention of the parties only, and, if the instrument be so drawn as to show a contrary intention, it will not be permitted to have the effect of a technical release, but will be construed as only an agreement not to charge the party to whom the release is given. In such a case, it has no greater effect than a covenant not to sue, which is not technically a release, and, when given to one of several joint debtors, is not construed as a release of the others,[51] so that, as already stated, the remedy of a party to whom such an agreement is given, and who is afterwards sued, is by action on the covenant.

ACCORD AND SATISFACTION

27. An **accord,** in the case of contracts, is an agreement by which the creditor agrees to accept some other thing in lieu of that which is contracted or promised to be done, and, when this agreement is fully executed, it becomes what is technically known as an *accord* and *satisfaction.*[52]

If, before action, the defendant deliver to the plaintiff, and the plaintiff accept from the defendant, either money or chattels, or securities for money, in satisfaction and discharge of the debt or cause of action, that is a good answer to an action for the debt or for damages for a breach of contract,[53] whether the original contract were a simple contract or one under seal.[54]

28. To constitute a perfect accord and satisfaction, it is essential, (1) that the accord be founded on a valuable consideration; (2) that it be accepted in satisfaction by the creditor; and (3) that it be completely executed by the debtor.[55]

[50] 17 Mass. 581 (1822).
[51] 85 Me. 482 (1893).
[52] 75 N. Y. 574 (1879); 33 Fed. Rep. 5 (1887).
[53] Add. Cont. (9th Ed.), p. 168.
[54] 119 N. Y. 1 (1890); L. R. 22 Q. B. Div. (Eng.) 537 (1889).
[55] Ans. Cont. (8th Ed.), p. 383; 151 Pa. 415 (1892).

An accord executory without performance is no discharge; so, also, mere tender of performance or partial performance of the new agreement is not sufficient.[56] As the rule is generally stated, accord without satisfaction is no defense.[57]

The rule, however, that a mere promise is not sufficient to constitute an accord and satisfaction, is subject to the qualification, that, where the parties expressly agree that the new promise shall itself be a satisfaction of the prior debt or duty and the new agreement is based upon a sufficient consideration and is accepted in satisfaction, then it operates as such and bars the action.[58] But it must be shown that it was the intention to accept the new promise in satisfaction of the prior obligation, and, where the performance of the new promise is the thing to be received in satisfaction, then, until performance, there is no complete accord and the original obligation remains undischarged.[59]

29. As to the consideration necessary to sustain an accord and satisfaction, the ordinary rules as to what constitutes a valuable consideration apply—a subject previously considered.[60] The most important rule in this connection is that the payment of a sum less than the amount of a liquidated debt cannot be made an accord and satisfaction of the whole debt,[61] a doctrine which rests on a very early decision,[62] and which, notwithstanding much adverse criticism, has been steadily maintained—a notable demonstration of the rule of *stare decisis* (to abide by former precedents). While, however, the rule is that a creditor cannot bind himself by a simple agreement (as distinguished from a release under seal) to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being *nudum pactum*,[63] yet, if there be any benefit, or legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale and render the consideration

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[56] 38 Pa. 147 (1861); 106 Mass. 34 (1870).
[57] 84 Hun (N. Y.) 318 (1895).
[58] 23 Vt. 561 (1851); 76 N. Y. 574 (1879); 80 Tex. 73 (1891); 9 Wash. 168 (1894).
[59] 80 Tex. 73 (1891); 9 Wash. 168 (1894).
[60] See *subtitle* Sufficiency of Consideration *supra*.
[61] 4 Watts (Pa.) 126 (1835); 27 Me. 362 (1847).
[62] 5 Co. Rep. (Eng.) 117 (1602); 1 Stra. (Eng.) 426 (1717).
[63] L. R. 9 App. Cas. (Eng.) 605 (1884).

sufficient to support the agreement.[64] The rule does not apply where the claim is unliquidated and payment is made by way of compromise or settlement, or where the payment is made not in money but in property, no matter of what intrinsic value, or where the payment is made by one not the debtor but a stranger under no obligation to pay the debt,[65] or where the debtor undertakes to pay at an earlier date or different place than required by the original obligation. In fact, whenever a new duty is undertaken by the debtor, which is, or may be, burdensome to him or beneficial to the creditor, a new consideration arises out of such undertaking and sustains the agreement with the creditor.[66]

30. A **composition agreement,** by which a number of creditors agree to accept less than the full amount of their respective debts in satisfaction thereof, will, if carried into effect by the debtor, amount to a good accord and satisfaction.[67] The agreement by the respective creditors, each to give up a part of his claim, is a sufficient consideration. Every composition deed is in spirit, if not in its terms, an agreement between the creditors themselves as well as between them and the debtor. But such a composition agreement cannot be made by a debtor with one creditor alone.[68] The debtor is not discharged until he pays the composition; until performed, the agreement is merely an accord executory.[69]

An accord and satisfaction by one or more of several joint creditors is effectual as to all when there is such a unity of interest as to require a joinder of all in a personal action for the recovery of the demand.[70] An accord and satisfaction between a creditor and one of a number of joint, or joint and several, debtors, may have

[64] 124 N. Y. 164 (1891); 156 Mass. 19 (1892); L. R. 9 Q. B. Div. (Eng.) 37 (1882), quoting note to 1 Sm. Lead. Cas., p. 366 (8th Ed.).

[65] 2 Metc. (Mass.) 283 (1841); 43 Conn. 455 (1876); 99 Mich. 247 (1894); 148 N. Y. 326 (1896); 25 Ore. 336 (1894); 53 Minn. 88 (1893).

[66] 25 Fed. Rep. 398 (1885); 11 W. N. Cas. (Pa.) 389 (1882); 26 Conn. 392 (1857).

[67] 142 N. Y. 404 (1894).

[68] 100 Mass. 249 (1868).

[69] L. R. 7 Ch. App. (Eng.) 723 (1872).

[70] 140 Mass. 549 (1886); 134 N. Y. 409 (1892); 22 Q. B. Div. (Eng.) 537 (1889).

the effect of discharging all,[71] but, as in the case of a release, the tendency of the decisions is not to give a stronger effect to such an agreement than was clearly intended by the parties. Generally, nothing short of a full and technical release will be permitted to have such an effect.[72]

BY OPERATION OF LAW

MERGER

31. Contracts are said to be discharged by operation of law in the cases of *merger*, *alteration*, and *bankruptcy*.[73] It is a general rule of law that, if the parties to an agreement afterwards put their contract in the form of a higher security than that originally adopted, the lower security becomes merged in and extinguished by the higher.[74] "It is a rule too firmly rooted in justice and honesty to be easily eradicated from any system of wise laws, that all negotiations, all conversations, all oral promises, all verbal agreements are forever merged in, superseded and extinguished by, the sealed instrument which is the final outcome and result of the bargaining of the parties."[75]

32. The **rules governing the process of merger** are thus summarized by an authority: (*a*) The two securities must be different in their legal operation, the one of a higher efficacy than the other. A second security taken in addition to one similar in character will not affect its validity, unless there be discharge by substituted agreement. (*b*) The subject-matter of the two securities must be identical. (*c*) The parties must be the same.[76]

So, also, if there be a breach of contract, or any other cause

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[71] 4 Ad. & Ell. (Eng.) 675 (1836); 7 Cow. (N. Y.) 224 (1827); 37 Barb. (N. Y.) 317 (1861).

[72] 146 Mass. 253 (1888); 48 Pa. 168 (1864).

[73] Ans. Cont., * p. 326.

[74] 51 Fed. Rep. 113 (1892); 20 N. J. Law 340 (1845); 138 Mass. 544 (1884); see *subtitles* Form of Contracts, Merger of Simple Contract in Specialty, *supra*.

[75] 148 Pa. 503 (1892), at p. 506 by Thayer, P. J.

[76] Ans. Cont. (8th Ed.), p. 396; 22 Md. 274 (1864); 16 C. B. N. S. (Eng.) 527 (1864).

of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, which is changed into a matter of record.[77] As the latter is of higher nature, the inferior remedy is merged in the higher.[78] But no right or claim, other than that actually involved and determined, is thus merged in the judgment.[79]

ALTERATION

33. The **alteration** of a contract in writing, whether under seal or not, after its execution, will, under certain circumstances, discharge the contract.[80] To have this effect the alteration must be in a material part of the instrument;[81] it must be made by a party, or by a stranger while the document is in the possession of the party, and for his benefit; it must be an intentional alteration and made without the consent of the other party.[82]

While an unexplained alteration *prima facie* vitiates the instrument, it will not have the effect of totally discharging the obligation, if innocently made without any improper motive. The decisions in the United States are, like the English cases, inclined to regard an alteration by a stranger, without the knowledge of the party benefited, as merely a spoliation and not as totally destroying the effect of the instrument.[83]

BANKRUPTCY

34. An **adjudication in bankruptcy** operates as an assignment of the property and choses in action of the bankrupt to his trustee in bankruptcy for the benefit of his creditors, and an order of discharge in bankruptcy releases the bankrupt from all provable debts.[84]

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77 13 M. & W. (Eng.) 494 (1884).

78 6 Wall. (U. S.) 231 (1867); 151 Mass. 386 (1890).

79 94 U. S. 606 (1876); 99 U. S. 261 (1878).

80 See *subtitles* Implied Contracts, Express contracts exclude implied, *supra*.

81 6 Wall. (U. S.) 80 (1867).

82 13 M. & W. (Eng.) 342 (1844); L. R. 10 Ex. (Eng.) 330 (1875).

83 101 Ala. 205 (1893); 81 Me. 44 (1888); 168 Pa. 219 (1895); 2 Mas. (U. S.) 478 (1822); 35 N. J. Law 227 (1871).

84 Hollingsw. Cont., p. 579; Add. Cont. (9th Ed.), p. 179; see U. S. Bankruptcy Law of 1898.

BY PERFORMANCE

SUFFICIENCY OF PERFORMANCE

35. Where the parties to a contract have performed all their reciprocal obligations according to the terms of their agreement, the contract is discharged.

It is obvious that parties entering into agreements must perform them according to their legal effect, and, if they charge themselves with obligations possible to be performed, they must make them good unless performance be rendered impossible by the act of God, the law, or the other party to the contract. Unforeseen difficulties, however great, are no excuse.[85] Against such results they must guard themselves by provisions in the contract. At the same time a merely literal performance of an agreement may fail to meet its true purpose. The general rule is that the performance must be such as is required by the true spirit and meaning of the contract and the intention of the parties as expressed therein.[86] Performance need not in all cases be literal and exact. It is sufficient if the party bound to perform, acting in good faith and intending and attempting to perform his contract, do so substantially; then he may recover, notwithstanding slight or trivial defects in performance for which compensation can be made by an allowance to the other party.[87]

The difficulty of adhering in all instances to the literal performance of a contract is illustrated by the case where one party agrees to perform a contract to the satisfaction of the other. It is declared by some authorities that it is not a compliance with such a contract to prove that the promisee should have been satisfied, particularly where the subject-matter involves questions of taste, fancy, interest, or personal satisfaction and judgment, such as the making of a suit of clothes, or the painting of a portrait; although, in contracts for work and labor to be performed in an ordinary

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[85] 2 Wall. (U. S.) 1 (1864); 16 Me. 164 (1839); 20 Johns. (N. Y.) 130 (1822).

[86] 2 Pars. Cont.,* p. 656.

[87] 88 N. Y. 648 (1882), at p. 650.

business, the courts are inclined to construe such stipulation as agreements to do the thing in such a way as should reasonably satisfy the promisee, and that an obligation must be made in good faith after trial and not as a result of mere caprice.[88]

A vendor of goods does not comply with his contract by the tender or delivery of either more or less than the exact quantity contracted for or by sending the goods sold mixed with other goods.[89] The supreme court of the United States has said that the seller is bound to deliver the quantity stipulated and has no right, either to compel the buyer to accept a less quantity, or to refuse him to select a part out of a greater quantity; and, when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.[90]

36. No principle of the common law has been better established or more often affirmed, both in the United States and England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud and is neither the manufacturer nor the grower of the article he sells, the maxim *caveat emptor* applies; there is no warranty of the quality of the goods and the purchaser buys at his own risk.[91] But where a manufacturer of an article sells it for a particular purpose, the purchaser making known to him at the time the purpose for which he buys it, the seller thereby warrants it reasonably fit and proper for the purpose for which it is sold and bought.[92] It is also a general rule that where goods

[88] 108 Pa. 201 (1885); 163 N. Y. 404 (1900); 113 Mass. 136 (1873); 39 Mich. 49 (1878); 101 N. Y. 387 (1886); 149 Mass. 284 (1889); 165 Ill. 544 (1897); 155 Pa. 394 (1893).

[89] 2 Benj. Sales (6th Am. Ed.), Sec. 1,030; see *The Law of Property:* Sales of Personal Property; 115 N. Y. 539 (1889).

[90] 115 U. S. 188 (1885), at p. 204.

[91] 10 Wall. (U. S.) 383 (1870).

[92] 110 U. S. 108 (1883).

are sold by description, the seller must deliver goods of the kind and quality contracted for, or else the buyer may refuse to accept them; and it is further generally implied that the goods are of such a quality as to be merchantable.[93]

37. Where the quantity to be delivered is stated in the contract with the addition of such qualifying terms as *about*, or *more or less*, the question may arise as to what may constitute performance.[94] To govern such cases, the United States supreme court has laid down the following rules: (1) Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of "about," or "more or less," or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. (2) When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words "about," "more or less," and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses and deficiencies in number, measure, or weight. (3) But, if the qualifying words be supplemented by other stipulations or conditions, which give them a broader scope or a more extended significance, then the contract is to be governed by such added stipulations and conditions.[95]

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[93] Leake Cont. (3d Ed.), p. 714; 167 N. Y. 48 (1901); 24 Q. B. Div. (Eng.) 650 (1890).

[94] 2 Benj. Sales (6th Am. Ed.), Sec. 1,034

[95] 96 U. S. 168 (1877), at p. 171, by Justice Bradley.

SUBSTANTIAL PERFORMANCE

38. Generally, an entire contract must be performed in all its parts by him who claims counter performance from the other contracting parties, and, if there be a failure in any particular, no recovery can be had.[96] In the case of mutual promises, that is, where two acts are to be done concurrently by parties under a contract, the obligation on the part of each is dependent on that of the other, and the act of each is done upon the implied condition of performance by the other.[97] A rigid adherence to this rule, in all cases, would inflict injustice, particularly where the contract is in form entire but embraces a variety of acts more or less essential to the whole performance. Where a party, acting honestly and intending to fulfil his contract, performs it substantially, but fails in some comparatively unimportant particulars, the other party will not be permitted to enjoy the fruits of such imperfect performance without paying a fair compensation according to the contract, receiving a credit for any loss or inconvenience suffered.[98]

When a special contract has not been fully performed, but the plaintiff (the party seeking to recover) has in good faith done what he believed to be a compliance with the contract, and has thus rendered a benefit to the other party (the defendant), he can recover the value of his services, not exceeding the contract price, after deducting the damages which the defendant has sustained by the breach of the stipulations of the contract.[99] For, if the part which he agreed to perform and did not perform were of slight importance, it is not a condition precedent to recovery.

39. There is a distinction which must be particularly remembered between cases where the deviation from the literal contract is so slight as to amount in fact to substantial performance by the promisor, and those where there is an

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[96] 5 S. Dak. 352 (1894).
[97] 21 Fed. Rep. 352 (1884).
[98] 1 H. Bla. (Eng.) 273 (1777), note; 15 Pa. 151 (1850); 61 Wis. 623 (1884); 9 N. Y. Supp 439 (1890).
[99] 7 Pick. (Mass.) 180 (1828); 141 Mass. 25 (1886).

admitted breach which precludes a recovery on the contract itself, but where the performance has proved of some value to the other party and a recovery is allowed on a *quantum meruit* (as much as the party deserved).[100]

Whether or not there have been a substantial performance of a contract is a question of fact.[101] As recently declared judicially, "substantial performance is performance except as to unsubstantial omissions with compensation therefor."[102] He who relies upon substantial, as contrasted with complete, performance must prove the expense of supplying the omissions, or he fails in his proof, for he cannot recover for full performance when a part of the contract is still unperformed.[103] The doctrine of substantial performance necessarily includes compensation for all defects which are not so slight and insignificant as to be safely overlooked.[104] When the plaintiff shows that he performed his contract, he is entitled to judgment for the contract price; but when he shows that he performed his contract, except that, through inadvertence, he omitted to do some unsubstantial things, he is not entitled to recover anything until he shows that the things omitted, if worthy of any attention whatever, can be supplied for a comparatively small sum, in which event he can recover the contract price after deducting that sum.

PLACE OF PERFORMANCE

40. When the parties to a contract have agreed upon the time and place of performance, the performance must be at that particular time and place to constitute a discharge of the contract.[105] Where no place is designated for the performance of the contract, the rules governing the place where performance must be made vary to some extent with the subject-matter of the agreement, and in fact must frequently be inferred from the terms of the contract, or the

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100 171 Mass. 492 (1898); 173 Mass. 1 (1899).
101 112 Mass. 296 (1873).
102 82 Hun (N. Y.) 158 (1894).
103 181 Pa. 530 (1897).
104 163 N. Y. 220 (1900), at p. 226.
105 32 Me. 31 (1850); 101 Ill. 138 (1881)

circumstances of the particular transaction in question.[106] In the case of sales of chattels, if no place of delivery be specified in the contract, the articles sold must, in general, be delivered at the place where they are at the time of the sale,[107] unless some other place be required by the nature of the article, or by the usage of the trade, or the previous course of dealing between the parties, or be inferred from the circumstances of the case.[108] In the absence of a contrary agreement, the vendor is not bound to send or carry the goods to the vendee; he does all that he is bound to do by leaving or placing the goods at the buyer's disposal.[109] While this rule is supported by the weight of authority the decisions are not altogether harmonious. Thus, in a Pennsylvania case, it has been said that where the place is not fixed, but the time on or before which the delivery is to take place is stipulated, the party to deliver must be the first actor, and, if the articles be portable, tender them at the vendee's residence; or, if cumbersome, request the vendee to fix a place of delivery.[110]

In an ordinary contract for the sale and delivery of goods "free on board," the principle is said to be well established that the seller is under no obligation to act until the buyer names the ship to which the delivery is to be made; for, until he has that information, the seller cannot put the goods on board.[111] But, where either the time or place of delivery is, by the nature of the contract, or by its express provisions, at the seller's option, a different rule prevails; in such case the seller becomes the first actor, and it is his duty to give notice of the time or place or both, as the case may be, at which it is proposed to deliver the goods before any obligation rests on the buyer to name the ship upon which they are to be delivered; for, until the seller declares his election

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[106] 89 Pa. 136 (1879); L. R. 8 Q. B. Div. (Eng.) 1 (1881).

[107] 107 N. Y. 254 (1887); 100 U. S. 124 (1879).

[108] 2 Kent's Comm. 505.

[109] 4 Gray (Mass.) 447 (1855); 51 Vt. 489 (1879); 22 N. J. Law 525 (1850); Benj. Sales (6th Am. Ed.), Sec. 1,018 and Sec. 1,022, note.

[110] 3 W. & S. (Pa.) 295 (1842); 24 Pa. 76 (1854); 105 Mass. 276 (1870).

[111] 14 L. T. N. S. (Eng.) 666 (1866); 117 Pa. 490 (1888); 158 Pa. 107 (1893); 84 N. Y. 549 (1881).

as to time and place, the buyer cannot know when or where to have the vessel ready.[112]

Where goods are not delivered directly to the purchaser, but are to be sent as directed by him, or transported according to the usual mode in such business, a delivery to the carrier is deemed a delivery to the buyer.[113] But this is not the case where goods are sent "C. O. D."; that is, to be delivered by the carrier only on payment of the price by the purchaser.[114] Where the contract is to pay money and no place of payment is agreed upon, it is the debtor's duty to seek his creditor and personally tender him the money. But the debtor is not obliged to go out of the state for this purpose.[115]

TIME OF PERFORMANCE

41. Where the time is fixed for the performance of a contract, the full limit of time specified for performance is allowed to the promisor to discharge his obligation.[116] When a party has by contract anything to do anywhere on a certain day, he has the whole of the day for performance and may perform it at any convenient time before midnight, such time varying according to the nature of the act to be done. Thus, the tender of a sum of money must be made a sufficient time before midnight to permit the other party to receive and count it. But, where the performance is to be made at a particular time and place, and where the law implies a duty on the part of the promisee to attend for the purpose of completing the transaction, then the attendance for performance is to be by daylight and a convenient time before sunset.[117] In other words, if money is to be paid, or any other act is to be performed, on a certain day and at a certain place, the legal time of performance is the last convenient hour of the day for transacting the business,[118] and when daylight is required for the proper examination of the goods tendered, time should be given for such examination

[112] 41 Iowa 104 (1875).
[113] 141 Mass. 593 (1886); 121 N. Y. 179 (1890).
[114] L. R. 4 Q. B. (Eng.) 196 (1869); 146 Mass. 68 (1888).
[115] 60 N. Y. 233 (1875).
[116] 2 Whart. Cont., Sec. 884.
[117] 6 M. & G. (Eng.) 593 (1843), at p. 625.
[118] 3 Wash. C. C. (U. S.) 140 (1812).

before sunset and by daylight.[119] But the parties may meet and perform at the agreed place during any part of the day, though not the last convenient hour.

In contracts of merchants for the sale and delivery, or for the manufacture and sale, of marketable commodities within a certain time, it has been held, that performance within the time is a condition precedent to the enforcement of the contract,[120] upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.[121] But in contracts for work or skill and the materials upon which it is to be bestowed, a statement fixing the time of performance of the contract is not ordinarily of its essence, and a failure to perform within the time stipulated, followed by substantial performance after a short delay, will not justify the aggrieved party in repudiating the entire contract, but will simply give him his action of damages for the breach of the stipulation.[122] While parties, by their express agreement, may make time the essence of their contract,[123] the general rule of equity is that time is not ordinarily of the essence unless it clearly appear that such was the intention of the parties.[124]

Where the parties have not fixed the time within which the contract must be performed, the contract is, in effect, an engagement to perform within a reasonable time;[125] what will constitute a reasonable time usually depends on the circumstances of the particular case, such, at least, as the parties may be supposed to have contemplated in making the contract.[126] The words *forthwith* and *immediately* in contracts, are construed as stronger than the expression *within reasonable time* and imply prompt, vigorous action without any delay, and whether there have been such action is a question of fact.[127] A contract by a manufacturer to furnish a specified

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119 62 N. Y. 151 (1875).
120 52 Fed. Rep. 700 (1892).
121 115 U. S. 188 (1885), at p. 203; 96 U. S. 24 (1877).
122 7 Wheat. (U. S.) 13 (1822); 51 Pa. 165 (1865).
123 2 P. & W. (Pa.) 454 (1831).
124 48 Kan. 494 (1892); 102 Cal. 83 (1894); 97 Mass. 92 (1867).
125 107 N. Y. 61 (1887).
126 164 N. Y. 187 (1900); L. R. 4 Q. B (Eng.) 127 (1868).
127 L. R. 4 Q. B. Div. (Eng.) 471 (1878).

article "as soon as possible" means *within reasonable time*, regard being had to the manufacturer's ability to produce them, and the orders he may already have in hand,[128] assuming that the promisor had at the time all necessary appliances to enable him to proceed without delay.[129]

42. The word **month**, although at common law meaning a lunar month, is in mercantile contracts understood to mean a calendar month;[130] as a general rule, *days* are to be counted as consecutive days and include intervening Sundays, unless the contrary be expressed or a usage to that effect be shown;[131] but, this is not uniformly the rule applied where the time is less than a week.[132] The general rule is, also, that when an act is to be performed within a certain number of days and the last day falls on Sunday, the person charged with the performance of the act has the following day to comply with his obligation.[133] But this rule, according to some authorities, is not to be applied to acts which by statute are required to be done within a time therein limited.[134] However, these questions depend almost entirely on local statutes and their interpretation.

PAYMENT

43. By **payment** is meant the discharge of a contract to pay money by giving to the party entitled to receive it the amount agreed to be paid by one of the parties who entered into the agreement.[135] In its broadest sense, payment is the actual accomplishment of the thing that the party obliges himself to do,[136] whatever that may be, although, in our acceptation, it is ordinarily confined to money engagements. In its legal import, payment is a dual act in which the debtor delivers, and the creditor accepts, the money or other property offered in satisfaction of the obligation.

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128 1 C. B. N. S. (Eng.) 110 (1856).
129 L. R. 4 Q. B. Div. (Eng.) 670 (1878).
130 19 Pick. (Mass.) 532 (1837); 6 W. & S. (Pa.) 179 (1843).
131 Benj. Sales (7th Am. Ed.), Sec. 684.
132 2 Hill (N. Y.) 375 (1842); 112 Mass. 58 (1873).
133 120 N. Y. 217 (1890); 147 U. S. 47 (1892); 10 Gray (Mass.) 306 (1858).
134 134 Mass. 364 (1883); 54 Fed. Rep. 417 (1893); 87 Wis. 152 (1894).
135 2 Dan. Neg. Inst. (4th Ed.), Sec. 1,221.
136 16 M. & W. (Eng.) 61 (1846).

Payment may be either in money or in money's worth. But to amount to a payment the thing must be done; the money must be paid, or the article taken as money must be actually received by the creditor, under an express agreement that it shall operate as payment.[137]

44. As a rule, the giving of a note or other negotiable instrument by a creditor, instead of money, will not amount to payment. By the general commercial law, both in England and the United States, a promissory note does not discharge the debt for which it is given, unless such be the express agreement of the parties; it only operates to extend until its maturity the period for the payment of the debt.[138] The creditor may return the note when dishonored and proceed upon the original debt. The acceptance of the note is considered as accompanied with the condition of its payment. Thus, it was said in a very early English case that "a bill shall never go in discharge of a precedent debt except it be part of the contract that it should be so."[139] Such has been the rule in England ever since, and the same rule prevails, with few exceptions, in the United States.[140] The doctrine proceeds upon the obvious ground that nothing can be justly considered as payment in fact but that which is in truth such, unless something else be expressly agreed to be received in its place.[141] That a mere promise to pay cannot of itself be regarded as an effectual payment is manifest.

The rule that prevails in some of the United States is an exception to the general law, it being laid down in these states that when a debtor gives his negotiable note to his creditor for a debt due on simple contract, the legal presumption is that the note is received in payment. But this presumption may be rebutted by evidence that such was not the intention of the parties.[142]

The receipt, therefore, by a creditor from his debtor of the

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137 44 N. C. 336 (1853).
138 3 Wall. (U. S.) 37 (1865), at p. 45.
139 1 Salk. (Eng.) 124 (1691).
140 34 N. J. Eq. 167 (1881); 29 Pa. 448 (1857).
141 79 Md. 318 (1894), and note on case in 25 L. Rep. Ann. 200 (1894).
142 2 Metc. (Mass.) 76 (1840); 134 Mass. 140 (1883); 157 Mass. 584 (1893); 70 Me. 56 (1879); 111 Ind. 137 (1887).

debtor's own note, check, or the note or check of a third person for an antecedent indebtedness, even when the check is certified, will not, as a rule, be deemed an absolute payment in the absence of a special agreement to that effect, but will be deemed merely as collateral security or a conditional payment.[143] But the original debt will be extinguished when the paper received has been both transferred and accepted as payment, and the debt has been discharged by force of the acts and concurring intention of both parties.[144]

There is a distinction recognized between those cases where a note is given for an *antecedent* debt and those where it is given for a *contemporaneous* debt. In the latter case, it is claimed that when a note is given at the actual time of purchase, it is substantially a barter of the note for the goods and a fair inference that the note is taken in payment. Upon this point, however, the views of text-writers and judges are inharmonious.[145]

45. Where there are several distinct debts from one debtor to one creditor, and a payment is made on account, the question may arise as to how the sum shall be applied. Upon this point, the law is concisely stated as follows: "The general rule in regard to the appropriation of payments on account is, that the party who pays money has a right to apply the payment as he sees fit; if there be several debts due from him, he can designate that one to which it shall be applied. If the party making the payment do not, at the same time, make any specific appropriation thereof, then the party to whom the payment is made may apply it to legal claims as he pleases. If neither party make any specific application of the payments to the discharge of any particular debt, the presumption is that the first items of a running account, or that the debts which are first in point of

143 131 Pa. 233 (1889); 98 Pa. 13 (1881); 123 Ind. 78 (1889).

144 123 N. Y. 332 (1890); see *The Law of Commercial Paper*, and *The Law of Banks and Banking*.

145 Story Prom. N., Sec. 104; 2 Pars. Notes & B., p. 157; Dan. Neg. Inst., Sec. 1,261.

time, are discharged. In all cases, if the parties themselves have omitted to make any specific appropriation of payments, the law will appropriate them according to the justice and equity of the case for the benefit of both parties."[146]

TENDER OF PERFORMANCE

46. A contract will sometimes be discharged by **tender of performance. Tender** is a formal and unconditional offer by one of the parties to a contract to fulfil his obligation.

The effect of tender in discharging the promisor from future liability depends upon the nature of the contract. If there be an obligation on the part of the promisor to deliver specific articles in payment of a debt, then, if the articles be duly tendered for acceptance in strict accordance with the terms of the agreement at the proper time and place, and acceptance be refused, this is a discharge of the contract.[147] The right of property in the articles, it is generally held, passes to the creditor, and, if the debtor elect to retain possession of them, he does so in the character of bailee to the creditor and at his risk and expense.[148] If the obligation on the part of the promisor be to pay a sum of money, then, while a proper tender of the sum to the creditor will suspend interest and preclude a claim for damages and costs for non-payment, it is, nevertheless, not a discharge of the obligation, nor of the creditor's right to sue thereon.[149]

A tender, to be good, must be absolute and unfettered by conditions.[150] Any demand for a receipt, discharge, or assignment of the debt renders the tender invalid.[151] The tender must be of the entire amount of the debt; no valid tender can be made of a part only of the sum due.[152] In order to constitute a legal tender, he who makes it must actually produce and offer the correct amount to the creditor, or his duly

146 2 Story Cont., Sec. 1,153; 2 Story (U. S.) 264 (1842); 100 Mass. 327 (1868); 1 Mas. (U. S.) 323 (1817), at p. 338, by Story, J.

147 2 Kent's Comm. 508; 5 Watts (Pa.) 262 (1836); 15 W. Va. 44 (1879).

148 16 N. Y. 582 (1858); 72 N. Y. 595 (1878); 140 N. Y. 70 (1893).

149 10 S. & R. (Pa.) 14 (1823); 113 U. S. 542 (1884).

150 114 N. Y. 204 (1889).

151 118 Pa. 138 (1888).

152 5 Mass. 365 (1809); 68 Mich. 98 (1888)

authorized agent, in lawful money of the country, or in coin, if so expressed in the contract.[153] But it has been said that it is not necessary that the money should actually be produced, as well as offered, in all cases. If, when the offer is made, the creditor refuse absolutely to receive the money, the objection that the money was not actually produced is waived.[154] So, too, if the tender be made in funds that are not legal currency and no objection be made on that account, the objection is presumed to have been waived. If the creditor designedly absent himself from his home for the purpose of preventing the tender, or if he were absent with no intention to evade the tender, but, in consequence of his absence, the debtor, by the use of due diligence, was unable to find him or any one authorized to act on his behalf, the failure of the debtor, through no fault on his part to make the offer, will not defeat the tender.[155] The maxim that the law does not compel one to do vain or useless things applies to the circumstances of an attempted payment. It has been said that the tender of a sum greater than that actually due is not good unless it appear that the sum offered could be changed by the creditor.[156] A tender before the maturity of a debt that bears interest is defective,[157] but it has been questioned whether the offer of payment before maturity of a debt that did not bear interest would not be good.[158]

To stop interest and costs, a tender of payment must be kept good.[159] There must be shown a continued readiness to perform the contract. If the tender be refused, the debtor must retain the money and keep himself in readiness to fulfil his tender if the other party change his mind. When an action has already been commenced and is pending, if the defendant be disposed to admit the demand, he must not only offer to pay the amount admitted, but must go

153 72 N. C. 415 (1875); 8 Wall. (U. S.) 603 (1869); 61 Pa. 263 (1869).
154 18 W. Va. 320 (1881); 130 Pa. 235 (1889).
155 7 Cush. (Mass.) 391 (1851); 163 Mass. 322 (1895).
156 3 Camp. (Eng.) 70 (1811); 5 M. & W. (Eng.) 306 (1839).
157 5 Pick. (Mass.) 259 (1827).
158 Whart. Cont., Sec. 980; 113 Ind. 484 (1887); 90 N. Y. 442 (1882).
159 96 U. S. 580 (1877).

further and pay the sum into court.[160] In this way only can an offer to pay, pending a suit, be made complete.

47. In contracts where the parties are required to do concurrent acts, those upon the one side being the consideration for those on the other, it is not permitted to charge the mere neglect of the other party as a refusal to perform, or as a breach of the agreement.[161] Neither party can charge the other with breach of the terms nor put him in default without a tender of performance on his own part, or at least proof of readiness and willingness on his part to perform, and that actual performance has been prevented or expressly waived by the other party to whom performance was due.[162] An express refusal of the party to perform his part of the contract relieves the other party from the necessity of making any further offer or tender,[163] since "the law does not compel a man to do a vain and fruitless act," and to tender performance under such circumstances would be an unnecessary ceremony.[164]

48. Where a contract expressly stipulates that it is to be performed by one of the parties on notice, then notice is indispensable;[165] but, generally, a party is not entitled to notice unless he stipulate for it. The general rule is that where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulate for it; but where it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice should be given him.[166]

The rule as to demand of performance rests upon the same principle. It may be requisite from the nature of the contract, or the express stipulations of the parties; but, when not requisite as part of the agreement, each party must perform his obligation without waiting to be called upon.[167]

160 32 Fed. Rep. 316 (1887).
161 33 Vt. 233 (1860).
162 55 N. Y. 480 (1874).
163 105 Mass. 276 (1870); 98 Cal. 377 (1893).
164 147 N. Y. 223 (1895); see *subtitle.* By Breach *infra.*
165 2 Pars. Cont., *p. 668.
166 6 M. & W. (Eng.) 442 (1840); 2 A. K. Marsh (Ky.) 253 (1820).
167 162 Mass. 268 (1894); 28 N. Y. Sup. Ct. 280 (1867); 6 T. B. Mon. (Ky.) 609 (1828).

IMPOSSIBILITY OF PERFORMANCE

49. If one of the parties to a contract undertake to do something that it is impossible to perform, what will be the effect upon his liability? Cases where a contract is in fact or in law impossible of performance at the time of *entering* into the contract have been discussed.[168] When the performance of the promise becomes impossible *subsequently* to the making of the contract, the question of the liability of the promisor will depend on the nature of his undertaking.

If a person promise absolutely, without exception or qualification, that a certain thing shall be done by a given time, or that a certain event shall take place, and the undertaking is neither impossible nor unlawful at the time of the promise, then he is bound by his promise absolutely, unless the performance before that time become unlawful;[169] for, against such contingencies, the party might have provided in his contract by the exercise of ordinary prudence.[170] It is a well-settled rule of law that, where a party by his own contract absolutely engages to do an act, it is his own fault and folly that he did not thereby provide against contingencies and exempt himself from responsibility in certain events. In such cases, performance is not excused by inevitable accident or other contingency, although not foreseen or under the control of the party. Where the contract is absolute, the *vis major* (inevitable accident) is not an excuse for nonperformance.[171]

But this rule is only applicable when the contract imposes a positive and absolute obligation and is not subject to any condition express or implied. Where the event which prevents performance is of such a character that it cannot be reasonably supposed to have been in the contemplation of the parties, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. Thus, where the performance

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168 See *subtitle* Impossible Considerations *supra*.

169 25 Conn. 530 (1857); L. R. 4 Q. B. (Eng.) 127 (1868).

170 153 Ill. 102 (1894).

171 165 N. Y. 247 (1901), at p. 254

depends on the continued existence of a given person or thing, and such continued existence was assumed as the basis of the agreement, the death of the person or the destruction of the thing puts an end to the obligation.[172] Executory contracts for personal services requiring skill, or for the sale of specific chattels, come within this principle; the contract is construed as subject to the implied condition that the person or thing shall be in existence when the time of the performance arrives. So, if, after the contract is made, a law be enacted which makes subsequent performance impossible, the party is held to be excused.[173] So, also, if the impossibility arise from the acts or conduct of the promisee, the obligation is discharged on the principle that he who prevents a thing from being done may not avail himself of the non-performance which he has himself occasioned.[174]

50. In one of the leading English cases on the subject of impossible contracts,[175] the plaintiff contracted with defendant's wife (he acting as her agent) that she should play the piano at a concert to be given by the plaintiff. She was, on the day in question, too ill to perform. The court held that in such a case performance was excused. "All contracts," said the court, quoting from an earlier decision,[176] "for personal services, which can be performed only during the lifetime of the party contracting, are subject to the implied condition that he shall be alive to perform them; and should he die, his executor is not liable to an action for breach of contract occasioned by his death. So, a contract by an author to write a book, or by a painter to paint a picture, within a reasonable time, would be deemed subject to the condition that, if the author became insane, or the painter paralytic, and so incapable of performing the contract by the act of God, he would not be liable personally in damages any more than his executors would be if he had been prevented by death."

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[172] 3 B. & S. (Eng.) 826 (1863); 149 U. S. 1 (1892); 142 N. Y. 456 (1894).

[173] 4 N. Y. 411 (1850); L. R. 4 Q. B. (Eng.) 180 (1869).

[174] 102 U. S. 64 (1880); 149 N. Y. 489 (1896).

[175] L. R. 4 Ex. (Eng.) 269 (1871).

[176] E. B. & E. (Eng.) 145 (1859), at p. 793

51. The well-settled rule is that where the law creates a duty or charge, and the party is disabled from performing it without any default in himself, and has no remedy over, then the law will excuse him.[177] For example, the duty of a common carrier is to transport and deliver safely. He is made by law an insurer against all failure to perform this duty, except such failure as may be caused by the public enemy or by the act of God.[178] The phrase *act of God* does not lend itself readily to judicial definition, but is generally applied to inevitable accidents resulting from physical causes, such as tempests, floods, earthquakes, and other violent convulsions of nature which could not have been guarded against by the ordinary exercise of human skill, prudence, and diligence.[179]

A similar rule prevails when performance is prevented by mob violence on the part of striking workmen, which the carrier could not by reasonable efforts overcome;[180] although the mere fact alone that a strike exists is not sufficient to excuse performance of a contract.[181] Where, however, a contract contains a clause exempting the promisor from liability in case of a strike on the part of his employes, the ordinary implication is that the promisor is required to carry on his business in the ordinary and usual method, and is not required to resort to extraordinary means to prevent strikes. And, if a strike result from a reduction in wages, made in good faith under proper and reasonable circumstances, he will not be liable for non-performance caused thereby.[182]

The rule that if a thing to be done become physically impossible by the act of God performance is excused does not prevail where the essential purpose of the contract may be accomplished. If the intention of the parties can be substantially, although not literally, executed, performance is not excused.[183]

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177 12 N. Y. 99 (1854).

178 93 U. S. 174 (1876); 147 Pa. 343 (1892); see *The Law of Carriers:* Liability.

179 11 L. Rep. Ann. 615 (1891) and note; L. R. 1 C. P. D. (Eng.) 423 (1876).

180 102 N. Y. 563 (1886); 30 Fed. Rep. 48 (1887).

181 20 N. Y. 48 (1859); L. R. (1891) 1 Q. B. (Eng.) 35; 121 N. Y. 288 (1890).

182 58 N. Y. 573 (1874); 31 Neb. 1 (1890).

183 26 Me. 361 (1846); 28 N. Y. 217 (1863).

BY BREACH

52. A **breach,** or **default,** in the performance of a contract gives to the injured party a right of action for damages or pecuniary compensation for his loss; besides, the breach will, under some circumstances, discharge the injured party from his obligation to perform. A breach of contract does not necessarily discharge the contract. The contract may, for example, be only partially broken, or the injured party may elect not to regard it as a breach, but may go on with the contract reserving his right to sue for damages for the injury he has sustained. To determine whether or not a contract is discharged and ended by a breach is frequently a difficult question. But there is no doubt that a breach does give a right of action for damages.[184]

A breach of contract takes place (1) where a party renounces his liability and refuses to perform; (2) where he renders performance impossible; (3) where he fails to perform.

BREACH BY RENUNCIATION OF PERFORMANCE

53. If before the time fixed for performance one party give notice to the other of his intention not to perform the contract, the injured party may, if he choose, treat the contract as discharged and sue immediately for damages; or he may disregard the renunciation, await the time of performance, and then hold the other party responsible for the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.[185]

This is the English rule, and in the leading case the doctrine is stated as follows: "A renunciation of a contract,

[184] Ans. Cont. (8th Ed.), p. 349.

[185] L. R. 7 Exch. (Eng.) 112 (1872).

or in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract, but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not, of course, amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect to such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end, except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when, in the ordinary course, a cause of action on the contract would arise."[186]

54. In the United States, the great weight of authority in the state courts is to the same effect as the English decisions.[187] In the supreme court of the United States, the question was, until quite recently, regarded as an open one.[188] But in a recent decision, which carefully reviews all the cases, both in England and the United States, relating to anticipatory breaches of an executory contract, it is held

[186] 2 E. & B. (Eng.) 678 (1853).

[187] 61 N. Y. 362 (1875); 107 N. Y. 674 (1887); 158 Pa. 107 (1893); 130 Ill. 660 (1889); 41 W. Va. 717 (1896).

[188] 117 U. S. 490 (1885); 173 U. S. 1 (1898).

that the rule laid down in the leading English case is a reasonable and proper rule and is formally adopted. "The parties to a contract which is wholly executory," said the court, "have a right to the maintenance of the contractual relations up to the time for performance as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party must accept that position, why should there not be speedy action and settlement in regard to the rights of the parties?"[189]

On the other hand, the courts in some states have ruled that, while a renunciation before the time of performance may give cause to the injured party for treating the contract as rescinded, it nevertheless does not confer a present right of action. In order to charge one in damages for breach of an executory personal contract, the other party must show a refusal or neglect to perform at a time when, and under conditions such that, he is, or might be, entitled to require performance.[190]

When, during the course of performance, one of the parties repudiates the further performance of his contract, the injured party is discharged from further performance on his part and may bring his action at once, even though something still remains to be done on his part, without going to the trouble of tendering what has already in effect been refused.[191]

BREACH BY MAKING PERFORMANCE IMPOSSIBLE

55. When, either before the time of performance or during performance, one of the parties so acts as to render performance of the contract impossible, either by disabling himself or by wrongfully preventing the other party from carrying out the agreement, the effect is the same as in the case of renunciation. The injured party is discharged from

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[189] 178 U. S. 1 (1900), at p. 19.

[190] 114 Mass. 530 (1874); 6 N. Dak. 536 (1899); 38 Neb. 858 (1894).

[191] 50 N. H. 307 (1870); 102 N. Y. 10 (1886); 152 Ill. 59 (1894).

further liability to perform and may at once bring an action for the recovery of the damage which he has sustained.[192]

Upon this principle, a promise of marriage is held broken immediately upon the marriage of one of the parties to a third person, and a previous request to perform by the injured party need not be proved. In a case of this kind, the court said: "We must look at this case with a view to the feelings and intentions of the parties at the time of entering into such a contract, and the intention clearly is to marry in the state in which the parties respectively are at the time. If either party puts himself out of that state, he must be taken to dispense with the contract so far that the other may have an action against him without a request to marry."[193]

BY FAILURE OF PERFORMANCE

56. There are two questions to be considered in connection with failure in performance. The first is, what will be regarded as a failure of the promisor to perform? The second is, when will such failure discharge the promisee from his obligation?

VITAL AND SUBSIDIARY PROMISES

57. The answer to the first question is somewhat in the nature of a repetition of what has previously been said in discussing performance in general. Failure of performance in order to amount to a discharge must be a substantial breach of a vital part of the contract. The determination of what are the essential and vital covenants in a contract will depend on the true construction of the contract taken as a whole. In this connection, it has been said, "parties may think some matter, apparently of little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one; or they may think that the performance of some

192 L. R. (1894) 1 Q. B. (Eng.) 466; 103 U. S. 146 (1880); 110 U. S. 338 (1883); 54 Cal. 228 (1880); 167 N. Y. 234 (1901).

193 8 Q. B. (Eng.) 358 (1846); 42 N. Y. 246 (1870).

matter, apparently of essential importance and *prima facie* a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent."[194] The breach of a merely subsidiary promise, which the parties have not regarded as vital to the contract, will not operate as a discharge; and to determine whether the stipulation in question be vital or subsidiary, the whole contract must be looked at to see whether a failure to perform it go to the essence of the contract, or whether it merely partially affect it and may be compensated in damages.[195]

When the contract is substantially performed, a merely technical inadvertent or unimportant breach will not operate as a discharge.[196] For example, where a contract for the feeding of cattle provided that, if it were necessary to save hay, feeding racks were to be constructed, and it appeared that the owner of the cattle suffered no loss or damage by reason of the failure to furnish feeding racks, a breach of the contract in that respect was regarded by the court as harmless, and not as affording grounds for repudiating the contract.[197]

A strict and literal compliance with the terms of the contract may be waived by the promisee, and this waiver may be either an express modification of the terms of the agreement,[198] or implied from conduct clearly inconsistent with an intention to exact literal performance. Forfeitures are not favored, and acquiescence in acts inconsistent with a clause of forfeiture will take away the right to claim one.[199] Therefore, where the parties to a contract mutually relax its terms and fairly adopt a loose mode of executing it, without wilful departure therefrom, they forfeit the right to demand absolute compliance with the strict letter of the agreement,[200] although they are still entitled to compensation for proved defects.[201]

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194 1 Q. B. Div. (Eng.) 187 (1876).
195 83 L. T. N. S. (Eng.) 111 (1900); 108 Fed. Rep. 171 (1901).
196 181 Pa. 530 (1897); 1 W. N. Cas. (Pa.) 161 (1875).
197 107 Cal. 348 (1895).
198 165 Pa. 505 (1895).
199 31 Pa. 306 (1858); 53 Pa. 168 (1866).
200 3 La. Ann. 285 (1848).
201 181 Pa. 530 (1897).

But the intention to waive a right must be established by language or conduct, and not by mere conjecture or speculation;[202] nor will it be implied from mere silence on the part of the promisee. So, also, a waiver, to be available, must be clearly and explicitly shown to have been made by the party with a full knowledge of all the facts.[203] A waiver of a condition in a contract never occurs unless intended by the party, or where the act relied upon should, in equity, estop the party from denying it.[204] Whether the circumstances of the transaction prove a mutual waiver must be left to the jury for determination as a question of fact.[205]

INDEPENDENT AND DEPENDENT PROMISES

58. A total or partial failure of performance does not in all cases relieve the other party from his obligations under the contract, and to determine in just what cases it will have this effect is frequently a most difficult question. The first thing to be determined in every case is whether the covenants of the parties be dependent or independent.[206]

If the promises be mutually independent, then a breach, that is, a failure to perform some or all of them, on one side will not relieve the other party from his obligation of performance on the other. In other words, such a breach will not discharge a contract. If, on the other hand, the promises be mutually dependent, a breach on one side will excuse performance on the other; or, in other words, will discharge the contract.[207] Covenants are to be construed to be either dependent or independent of each other according to the intention and meaning of the parties and the good sense of the case, and technical words should give way to such intention.[208]

Where the covenants between the parties are mutual and concurrent, and both parties are to perform at the same

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202 19 Fed. Rep. 239 (1883), at p. 245.
203 29 U. S. App. 599 (1895).
204 166 Mass. 217 (1896).
205 173 Pa. 354 (1896).
206 2 Sm. Lead. Cas. (9th Am. Ed.), p. 1,212.
207 Hollingsw. Cont., p. 488; 82 Pa. 368 (1876); 113 N. Y. 222 (1889); 23 Vt. 114 (1850).
208 1 Saund. (Eng.) 320.

time, the covenants operate as dependent obligations, and neither can maintain an action until he has performed or tendered a performance of his part of the agreement;[209] but when it appears from the terms of the agreement or the nature of the case that the things to be done were not intended to be concurrent acts, but the performance of one party was to precede that of the other, then he who must do the first act may be sued although nothing has been done by the other party.[210]

In the case of independent promises, the covenants may be mutually and absolutely independent, so that a breach by one party will not discharge the other from his obligation to perform, his only remedy being an action for such loss as he sustains;[211] or the agreement may be that the performance by one shall be a condition precedent to performance by the other, in which case that which is to be performed first must be done or tendered before that party can sustain an action at law for non-performance by the other party.[212]

59. The **tendency of modern decisions** is to construe covenants, if possible, as dependent. Upon this question the supreme court of the United States has said: "Although many nice distinctions are to be found in the books upon the question, whether the covenants or promises of the respective parties to the contract are to be considered independent or dependent; yet it is evident, the inclination of the courts has strongly favored the latter construction as being obviously more just. The seller ought not to be compelled to part with his property without receiving the consideration; nor the purchaser to part with his money without an equivalent in return."[213] But whether the stipulations in a contract be dependent, so that neither party can call upon the other to perform unless he be ready and willing to perform himself, or whether they be independent, so that the remedy for non-performance

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[209] 105 Mass. 276 (1870)

[210] 113 N. Y. 222 (1889); 167 N. Y. 301 (1901).

[211] 3 W. & S. (Pa.) 300 (1842); 93 Pa. 526 (1880).

[212] 48 N. Y. 247 (1872); 153 U. S. 564 (1893); 51 Fed. Rep. 741 (1892).

[213] 1 Pet. (U. S.) 455 (1828), at p. 465.

is by action only, depends on the sense of the contract as a whole and the intention of the parties as thus ascertained.[214] In contracts for the sale of chattels, the presumption of law is, in the absence of an express agreement, that the delivery of the goods and the payment of the price are concurrent and dependent conditions.[215]

Where there has been a partial breach, the effect upon the rights of the injured party will depend upon whether the contract be entire or severable. A contract is entire when by its terms, nature, and purpose the promise of one party is conditioned and dependent on the performance by the other party of the whole of his promise in all its material provisions, and a breach by one party discharges the other from his obligation absolutely.[216] On the other hand, a severable contract is one in its nature and purposes susceptible of division and apportionment, having two or more parts in respect to matters and things contemplated and embraced by it not necessarily dependent on each other; a breach of it by one party in one respect will not operate as a discharge of the injured party from his duty to perform, unless the breach go to the foundation of the whole obligation and be equivalent to a repudiation of the contract.[217]

60. Lord Mansfield stated the doctrine in these words: "Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, the defendant has a remedy on his covenant and shall not plead it as a condition precedent."[218]

The breach of a covenant of the first class mentioned by Lord Mansfield, a dependent covenant which goes to the whole consideration of the contract, gives to the injured party the right to treat the entire contract as broken and

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214 5 S. Dak. 352 (1894); 168 Mass. 354 (1897).

215 167 N. Y. 107 (1901).

216 See *subtitles* Subject-Matter, Entire and Several Contracts, *supra*; 113 Mass. 350 (1873); 18 Wend. (N. Y.) 187 (1837); L. R. (1898) 1 Q. B. Div. (Eng.) 673.

217 110 N. C. 251 (1892); L. R. 9 App. Cas. (Eng.) 434 (1884).

218 1 H. Bla. (Eng.) 273 (1789).

to recover damages for a total breach.[219] But a breach of a covenant of the second class, an independent covenant which does not go to the whole consideration and is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract, and does not authorize the injured party to rescind the agreement, but he is still bound to perform his part, and his only remedy is a recovery of damages for the breach.[220]

Illustrations.—A case of the first class is the following: The plaintiff, a tailor, agreed to make the defendant a suit of clothes. Upon delivery, the defendant rejected the trousers as not properly made and refused to pay for the suit, although no objection was found to the coat and vest. In a suit to recover the contract price, it was held that the contract was entire and the defendant's promise to pay was conditional upon full and complete performance by the plaintiff of his agreement.[221]

A case of the second class is this: A railroad company leased to another ground for the erection of a hotel building at a station, and covenanted to stop its passenger trains passing at seasonable hours for meals a sufficient length of time to enable the passengers to take meals. After a time the railroad ceased to stop the only passenger train passing at a seasonable hour for meals. It was held that the agreement to stop the train was an incidental promise and did not go to the whole consideration so as to entitle the lessee on its breach to recover as for a total breach.[222]

61. A class of cases which has given rise to much discussion is that where there is an agreement to deliver goods in instalments, the question being whether a failure to deliver one instalment, or non-payment of one instalment, operate as an entire discharge of the other party.

Illustration.—Six hundred and sixty-seven tons of iron was to be shipped in four monthly instalments, and a failure to deliver more than 21 tons in the first month was held to discharge the purchaser. "At the outset," said the court, "the plaintiffs failed to tender the quantity according to the contract; they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for."[223]

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219 108 Fed. Rep. 171 (1901); 143 Mass. 1 (1886); 163 Mass. 95 (1895).

220 88 L. T. N. S. (Eng.) 111 (1900).

221 26 Misc. (N. Y.) 767 (1899).

222 83 Fed. Rep. 676 (1897).

223 5 H. & N. (Eng.) 19 (1859); L. R. 7 Q. B.Div.(Eng.)92(1881); L.R. 2 App.Cas. (Eng.) 455 (1877); 115 U. S. 188 (1885).

On the other hand, where, under a contract, from 6,000 to 8,000 tons of coal was agreed to be delivered into the buyer's wagons in twelve monthly instalments, and during the first month the buyer sent wagons for only 158 tons, it was held that the breach by the plaintiffs in taking less than the stipulated quantity during the first month did not entitle the seller to rescind.[224]

It is, therefore, a question in each case depending on the terms of the contract and the particular facts, whether the breach be a repudiation of the whole contract, or whether it be a severable breach giving rise to a claim for compensation, but not a right to treat the whole contract as repudiated.

REMEDIES UPON BREACH

62. Where a contract is discharged by breach, a right of action, as already stated, remains in favor of the injured party. He has also the option to assume certain positions in regard to his rights and obligations under the broken agreement, the character of which can only be stated in brief, as a full discussion of these questions would carry us beyond the domain of our subject into remedial law.

Where one repudiates the contract and refuses longer to be bound by it, the injured party has an election to pursue either of three remedies: (1) He may treat the contract as rescinded, and recover for as much as he has performed; (2) he may keep the contract alive for the benefit of both parties, being at all times ready and able to perform, and, at the end of the time specified in the contract for performance, sue and recover under the contract; or (3) he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for damages sustained, based upon the profits he would have realized if he had not been prevented from performing. In the latter case, the contract would be continued in force for that purpose. Where, however, the injured party elects to keep the contract in force for the purpose of recovering future profits, treating the contract as repudiated by the other party, in order to recover,

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224 L. R. 8 Q. B. (Eng.) 14 (1872); L. R. 9 App. Cas. (Eng.) 734 (1884).

the party suing must allege and prove performance on his part, or a legal excuse for non-performance.[225]

If while a contract be still executory, one party stops performance on the other side by an explicit direction to that effect, he thereby subjects himself to such damages as will compensate the other party for being stopped in the performance of his part of the contract. But the party thus forbidden cannot afterwards go on and thereby increase the damages and then recover such damages from the other party.[226]

DAMAGES

63. The subject of **damages** which a party injured by a breach of contract is entitled to recover does not come properly within the limits of this title, except to mention briefly the more general rules. The fundamental principle of all damages is that the injured party is entitled to compensation for the loss sustained.[227] The maxim of the law is: Where there is a right, there is a remedy. Every injury imports damage although it may be only nominal damage. The rule, as stated in an English case, is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.[228]

But this rule must be taken subject to considerable limitations.[229] Thus, in a later English case, it was said: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties,

225 152 Ill. 80 (1894); L. R. 7 Ex. (Eng.) 111 (1872); 108 Ill. 170 (1883); Ans. Cont. (8th Ed.), p. 352; see *subtitles* Implied Contracts, Work Done or Services Rendered, *supra*.

226 2 N. Dak. 300 (1891); 51 Minn. 499 (1892); 115 Mass. 159 (1874).

227 106 Mich. 542 (1895).

228 1 Exch. (Eng.) 850 (1848).

229 Ans. Cont. (8th Ed.), p. 376.

at the time they made the contract, as the probable result of the breach of it."[230] If the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendants, and thus made known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances from such a breach of contract.[231]

64. Damages, therefore, must not be remote. The injured party can, in general, claim such damages only as are the natural and probable results of the breach, such as might reasonably be supposed to have been in the contemplation of the parties at the time of making the contract.[232] Where there is no evidence of any loss arising from the breach of contract, the damages awarded must be nominal damages merely.[233]

A further limitation to the general rule is that damages which are speculative, uncertain, or conjectural cannot be recovered. To this class belong profits that cannot be fairly established by proof, not because the loss of profits should not be compensated, but solely because of the inability to estimate or determine the amount.[234]

The grounds upon which the general rule excluding profits, in estimating damages, rest, are: (1) that in the greater number of cases such expected profits are too dependent on numerous, uncertain, and changing contingencies to constitute a definite and trustworthy measure of actual damages;

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[230] 9 Exch. (Eng.) 341 (1854).
[231] L. R. 8 C. P. (Eng.) 131 (1873); 48 Pa. 309 (1864); 63 Fed. Rep. 62 (1894).
[232] 106 Mass. 468 (1871); 60 N. Y. 487 (1875); 130 N. Y. 372 (1892).
[233] 178 Pa. 377 (1896); L. R. (1897) 1 Q. B. Div. (Eng.) 692.
[234] 106 Mich. 542 (1895).

(2) because such loss of profits is ordinarily remote and not, as a matter of course, the direct and immediate result of the non-fulfilment of the contract; (3) and because most frequently the engagement to pay such loss of profits, in case of default in the performance, is not a part of the contract itself, nor can it be implied from its nature and terms. But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where, from the express or the implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into.[235]

65. Damages may be either *liquidated* or *unliquidated*. By *liquidated damages* is ordinarily meant an amount fixed by the parties as compensation for a breach; by *unliquidated damages* is meant compensation not fixed, but to be ascertained in an action at law, ordinarily by a jury.[236]

Parties entering into a contract frequently take into consideration the possibilities of a breach and provide what shall be the amount of compensation, in such case, payable to the injured party. And, if this be done and there be an agreement on default to pay a sum certain by way of liquidated damages, then that amount can be recovered.[237]

66. Upon this point, however, there is a distinction between *liquidated damages* and a *penalty*. By the latter is generally understood a sum of money to be paid in gross for the non-performance of an agreement which the debtor is required to pay over and above his original liability as a punishment.[238] In effect, the difference between the two is

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[235] 139 U. S. 199 (1891), citing Sedg. Meas. D. (7th Ed.), Vol. 1, p. 108; 110 U. S. 338 (1883); 9 Exch. (Eng.) 341 (1854), and other cases.

[236] Inder. Com. L., p. 448.

[237] 16 M. & W. (Eng.) 346 (1847); L. R. 21 Ch. D. 243 (1882).

[238] 6 Bing. (Eng.) 141 (1829); 7 Wheat. (U. S.) 13 (1822); L. R. 16 Ch. D (Eng.) 675 (1881).

this: The amount recoverable where a *penalty* is imposed is not the penal sum named as such, but only the damages actually sustained; the amount recoverable where liquidated damages are assessed is the sum agreed upon by the parties.[239]

The cases on the subject of penalties and liquidated damages are numerous and conflicting. The courts, in interpreting contracts with such clauses, will endeavor to arrive at the real intention of the parties, not being bound by the mere words used, but will look at the entire transaction and the peculiar circumstances of each case.[240] In case of doubt, the courts are inclined to treat the sum named as a penalty because then the defendant is permitted to show the actual damage.[241]

In general, and subject to what has just been said, some of the rules for the construction of such clauses are as follows: (1) Where the contract is for a matter of *uncertain* value, or the subject-matter is of such a nature that it would be extremely difficult to fix the actual damages by evidence, the parties may agree upon the sum to be recovered upon a breach thereof as liquidated damages;[242] (2) where the contract is for a matter of *certain* value, a stipulation that upon breach an amount shall be paid in excess of that value will be construed as a penalty, and the injured party will be limited in his recovery to his actual loss;[243] (3) where a contract contains a number of stipulations, the damages for the non-performance of some of which are certain and of others uncertain, and a fixed sum is named as damages for a breach of any of them, such sum is held to be a penalty.[244]

Upon the whole, however, the decisions are so conflicting that each case must be determined upon its own facts.

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239 L. R. (1895) 2 Q. B. Div. (Eng.) 289; L. R. (1896) 1 Q. B. (Eng.) 626; 164 Mass. 457 (1894); 2 Allen (Mass.) 456 (1861).

240 L. R. 8 C. P. (Eng.) 70 (1872); 175 Mass. 595 (1900); 122 N. Y. 397 (1890); 83 Md. 203 (1896); 45 N. J. Law 525 (1883); 101 Mass. 334 (1869).

241 Ans. Cont. (8th Ed.), p. 329; 65 Fed. Rep. 794 (1895).

242 85 Ala. 552 (1888); L. R. (1892) 1 Q. B. 127; 95 Fed. Rep. 296 (1899); 55 Ill. App. 25 (1893).

243 157 Ill. 186 (1895); 104 U. S. 771 (1881); L. R. 5 Q. B. Div. 592 (1880).

244 95 Fed. Rep. 250 (1899); 77 Ill. 452 (1875); 26 Fed. Rep. 18 (1885); 41 Minn. 522 (1889).

Upon this question it has been said: "We must look to the language of the contract, the intention of the parties as gathered from all its provisions, the subject of the contract and its surroundings, the ease or difficulty of measuring the breach in damages, and the sum stipulated, and from the whole gather the view which good conscience and equity ought to take of the case."[245]

Under certain circumstances the injured party may obtain in equity a decree for the specific performance of the contract, or an injunction to restrain its breach by the other party.

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[245] 48 Pa. 450 (1865); 127 Pa. 289 (1889); 111 Iowa 693 (1900).

A SERIES OF QUESTIONS

Relating to the Subjects Treated of in This Volume.

It will be noticed that the questions contained in the following pages are divided into sections corresponding to the sections of the text of the preceding pages, so that each section has a headline that is the same as the headline of the section to which the questions refer. No attempt should be made to answer any of the questions until the corresponding part of the text has been carefully studied.

THE LAW IN GENERAL

EXAMINATION QUESTIONS

(1) What is law?

(2) Define municipal law.

(3) What is the supreme power in a state?

(4) State the four divisions of every prescribed law.

(5) Define the common law.

(6) (*a*) What is a custom? (*b*) Describe each kind.

(7) What is a usage?

(8) (*a*) Define a written law. (*b*) What do written laws comprise?

(9) (*a*) What is a statute? (*b*) Name the synonymous terms.

(10) Define a local statute, and state how it is distinguished from a general statute.

(11) What are private statutes?

(12) What is a penal statute?

(13) (*a*) When does a statute take effect? (*b*) Explain the mode of making a statute.

(14) What are municipal ordinances?

(15) What is meant by interpretation and construction of statutes?

(16) (*a*) What is equity? (*b*) Explain the term jurisprudence, and the equity doctrine.

(17) (*a*) Define government in a political sense and in its relation to states. (*b*) Explain the theory of government.

(18) In what is the judicial power of the United States vested?

(19) What bodies comprise the legislative functions in a state?

(20) (*a*) What is a municipal corporation? (*b*) How is a municipal corporation created?

(21) (*a*) What is a court? (*b*) How is a court constituted? (*c*) What is meant by a court term?

(22) (*a*) What is a civil court? (*b*) What is a criminal court?

(23) (*a*) What is the meaning of the term suit? (*b*) Explain the relative meaning of the terms action and cause.

(24) (*a*) What does cause of action mean? (*b*) Give the meaning of the terms to commence suit and to prosecute suit.

THE LAW OF PERSONAL RIGHTS

EXAMINATION QUESTIONS

(1) Define the term (*a*) person; (*b*) natural persons; (*c*) artificial persons; (*d*) public persons; (*e*) private persons; (*f*) native; (*g*) alien.

(2) Explain what is meant by citizenship.

(3) What is the status of an alien in the United States?

(4) Define the term (*a*) sane persons; (*b*) insane persons; (*c*) lunatic; (*d*) idiot.

(5) (*a*) What are personal rights? (*b*) State the meaning of the absolute rights of individuals.

(6) What are primary personal rights?

(7) (*a*) In what does the right of personal security consist? (*b*) In what, the right of personal liberty?

(8) (*a*) What is civil liberty? (*b*) What is political liberty? (*c*) Explain liberty of speech and liberty of the press.

(9) Illustrate cases of violation of liberty of speech and of the press by defamatory statements.

(10) (*a*) What is a mercantile agency? (*b*) What is the character of the reports of such an institution? (*c*) Explain blacklisting in this connection.

(11) (*a*) What is meant by privileged communications? (*b*) Name and explain the kinds.

(12) What will constitute slander of title to property?

(13) Define the term (*a*) association; (*b*) corporate trust; (*c*) trades-union; (*d*) strike; (*e*) boycott; (*f*) lockout; (*g*) blacklist (in this connection); (*h*) conspiracy; (*i*) picketing.

(14) What are the principles of law as to the legality of a trust?

(15) State the meaning of monopoly and the principles of law in regard thereto.

(16) What is the law as to blacklisting employes by employers?

(17) May workmen lawfully associate in labor-unions and combine to control the action of other workmen?

(18) State the principles of law applicable to labor-unions, (*a*) while pursuing lawful purposes; (*b*) in the commission of unlawful acts.

(19) On what does the legality or illegality of a strike depend?

(20) What is meant by arbitration, as connected with labor disputes?

(21) (*a*) What is the law as to the collecting of debts by criminal process? (*b*) What, as to malicious prosecution?

THE LAW OF PROPERTY

(PART 1)

EXAMINATION QUESTIONS

(1) Define property and describe the classes into which it is divided.

(2) Define (*a*) corporeal personal property; (*b*) incorporeal personal property; (*c*) chattels real.

(3) Define (*a*) real property; (*b*) lands; (*c*) tenements; (*d*) hereditaments.

(4) (*a*) What are fixtures? (*b*) What tests determine whether an article be a fixture or not?

(5) Give illustrations of change of real property to personal and of personal property to real.

(6) Explain the terms (*a*) easement; (*b*) servitude; (*c*) *profits a prendre;* (*d*) license.

(7) What is the distinction between easements in gross and easements appendant or appurtenant?

(8) (*a*) How are easements created? (*b*) How extinguished?

(9) (*a*) What is a reservation? (*b*) What is an exception?

(10) Can there be an implied easement?

(11) Define (*a*) right of way; (*b*) a way of necessity; (*c*) a public highway; (*d*) a turnpike.

(12) Explain the three ways in which an easement of a public highway may be created, and how extinguished.

(13) Who is an abutter on land and what are his rights to the street or highway?

(14) What is the doctrine of rights of (*a*) light and air? (*b*) water rights, including watercourse and surface-water?

(15) Explain the law pertaining to (*a*) lateral and subjacent support; (*b*) party-walls.

(16) (*a*) What is rent? (*b*) What is ground rent? (*c*) Discuss the kinds of rent.

(17) Define (*a*) real estate; (*b*) tenure; (*c*) tenant. (*d*) Give the classes into which real estate is divided.

(18) Define the following estates: (*a*) fee simple; (*b*) fee tail; (*c*) for life; (*d*) by curtesy; (*e*) dower.

(19) What is meant by (*a*) estovers? (*b*) waste? (*c*) emblements?

(20) Define an (*a*) estate for years; (*b*) tenancy at will; (*c*) tenancy by sufferance.

(21) State the difference between a reversion and a remainder.

(22) What rules must be observed in the creation of remainders?

(23) Define and illustrate the kinds of remainders.

(24) Explain (*a*) the rule in Shelly's case, and (*b*) the rule against perpetuities.

(25) What is an executory devise?

(26) Describe estates upon condition, giving examples of estates upon condition precedent and upon condition subsequent.

(27) What is a conditional limitation?

(28) State the distinctions between tenancy in severalty, joint tenancy, and tenancy in common.

THE LAW OF PROPERTY

(PART 2)

EXAMINATION QUESTIONS

(1) Explain (*a*) the meaning of alienation of interests in land; (*b*) how effected.

(2) (*a*) What is alienation by inheritance? Define the term (*b*) inheritance; (*c*) descent; (*d*) purchase; (*e*) heir; (*f*) descendant; (*g*) distributee; (*h*) kindred; (*i*) consanguinity, lineal, and collateral; (*j*) heirs, apparent and presumptive.

(3) State, in detail, the English common-law rules of descent.

(4) Explain and illustrate the method of distribution of property under the intestate laws of the United States.

(5) Who may transmit and inherit estates?

(6) Discuss the law of (*a*) escheat; (*b*) forfeiture.

(7) Define statutes of limitations and state the essential requisites to perfect a title to real estate by prescription, or adverse possession.

(8) (*a*) What is estoppel? (*b*) Give examples of the various kinds.

(9) In your own words, state what is (*a*) laches; (*b*) acquiescence.

(10) What is abandonment of property and what are its effects?

(11) What method, not before questioned, remains by which property can be alienated involuntarily?

(12) (*a*) What is a voluntary alienation? (*b*) Describe the difference between a primary and a secondary conveyance.

(13) Define (*a*) feoffment; (*b*) gift; (*c*) grant; (*d*) lease; (*e*) exchange; (*f*) partition; (*g*) release; (*h*) confirmation; (*i*) surrender; (*j*) assignment; (*k*) defeasance; (*l*) lease; and (*m*) release.

(14) What is a public grant?

(15) Explain the processes by which public lands become private lands.

THE LAW OF PROPERTY

(PART 3)

EXAMINATION QUESTIONS

(1) (*a*) What is a private grant? (*b*) Define a deed.

(2) What does title mean?

(3) (*a*) Name and explain the parties to a deed; (*b*) also, the disabilities of parties.

(4) (*a*) Discuss the requisites of deeds. (*b*) Name the formal parts of a deed and explain them.

(5) (*a*) After a deed has been properly constructed, what is necessary to give it force and validity? (*b*) Explain the execution and delivery of a deed. (*c*) What is a delivery in escrow?

(6) Describe the attestation and acknowledgment of a deed.

(7) (*a*) What is meant by the recording or registration of a deed? (*b*) Explain the purpose and effects thereof.

(8) (*a*) What is a mortgage? (*b*) Who are the parties to a mortgage?

(9) Explain consideration in a mortgage.

(10) What is equity of redemption?

(11) Explain the instruction as to the modern mortgage and summarize the results.

(12) Describe the usual form of a mortgage.

(13) (*a*) What is a deed of trust? (*b*) What is an equitable mortgage?

(14) What passes by a mortgage of a building?

(15) Describe, briefly, in your own words, the rights and liabilities of the parties to a mortgage.

(16) What do you understand concerning the registration of a mortgage, and the necessity and effect thereof?

(17) (*a*) May a mortgage be assigned? (*b*) If so, in what case? (*c*) Explain the requisites to a valid assignment.

THE LAW OF PROPERTY

(PART 4)

EXAMINATION QUESTIONS

(1) To what is the term personal property applied?

(2) How are chattels personal divided?

(3) Define the terms (*a*) money; (*b*) currency; (*c*) lawful currency; (*d*) specie; (*e*) legal-tender currency.

(4) What are included under incorporeal personal property?

(5) How is title to personal property acquired?

(6) Explain original acquisition and the law as to the title of the finder of lost property.

(7) Describe confusion of goods and how the rights of parties in such case are settled.

(8) How may an involuntary transfer of personal property be effected?

(9) State the ways by which voluntary transfer is effected.

(10) Define (*a*) a gift; (*b*) a gift *inter vivos;* (*c*) a gift *mortis causa.*

(11) Explain (*a*) the elements necessary to the validity of a gift *inter vivos;* (*b*) those necessary to constitute a gift *mortis causa;* (*c*) the distinguishing features of each; and (*d*) how the latter differs from a legacy.

(12) (*a*) State the most important form of alienation of personal property; (*b*) define it, and mention the essentials.

(13) In what respect does a sale differ from (*a*) a bailment? (*b*) a consignment? (*c*) an exchange? (*d*) a lease? (*e*) a mortgage? (*f*) a pledge?

(14) Name the parties to a sale and explain the exceptions to the general rule that only the owner of goods or his lawful agent can transfer a good title to them.

(15) (*a*) State, in a general way, your impressions regarding the transfer of title to personal property or chattels. (*b*) Explain the difference between an executed and an executory sale, and an unconditional and conditional transfer of title to specific chattels.

(16) State, briefly, what has been said concerning the transfer of the title to chattels not specific?

(17) How may an executory agreement to sell become an executed one?

(18) Explain the meaning of *jus disponendi*.

(19) Illustrate how the validity of a contract of sale may be affected.

(20) Explain how a contract of sale may be avoided.

(21) (*a*) State, briefly, some of the principles of law applicable to the performance of a contract of sale. (*b*) Illustrate what does, and what does not, amount to an express warranty. (*c*) Explain what is an implied warranty.

(22) Illustrate, by cases, where delivery is sufficient and where it is not.

(23) (*a*) What are the principal duties of the vendee in a contract of sale? (*b*) Explain the various modes of payment. (*c*) Define tender.

(24) Describe, briefly, the remedies for breach of a contract of sale.

(25) (*a*) Define exchange, as connected with the transfer of personal property. (*b*) Illustrate a case of valid exchange.

THE LAW OF PROPERTY

(PART 5)

EXAMINATION QUESTIONS

(1) What is a chattel mortgage?

(2) How does such a transfer differ from (*a*) a conditional sale? (*b*) a pledge? (*c*) a mortgage of lands?

(3) (*a*) Explain bottomry and respondentia bonds; (*b*) hypothecation.

(4) Mention, briefly, the principles relative to (*a*) consideration; (*b*) the form; (*c*) the subject-matter; (*d*) the formal requisites.

(5) By what are the delivery and registration of chattel mortgages regulated?

(6) What may be substituted for the recording of the mortgage? Illustrate by example.

(7) What effect has the execution and recording of the mortgage-deed, so far as the mortgagee is concerned?

(8) (*a*) State the principles of law as to ownership conferred on the mortgagee. (*b*) Mention the cases in which these principles do not apply.

(9) (*a*) May the mortgagor dispose of his interest in the mortgaged property? (*b*) What results if he sell the mortgaged property?

(10) State the effect of subsequent liens put upon the mortgaged property, and the exception.

(11) How is assignability of chattel mortgages regulated?

(12) Where a note and chattel mortgage have been given for the debt, what should accompany the assignment of the mortgage?

(13) In case of default by the mortgagor, what becomes of the title to the mortgaged chattels?

(14) What are the mortgagee's duties in case of default by the mortgagor?

(15) State the mode of operation in foreclosure of a chattel mortgage.

(16) (*a*) Has the mortgagor in a chattel mortgage the right of redemption? (*b*) Explain his status with regard thereto.

(17) (*a*) What effect is produced by the payment of the debt secured by a chattel mortgage? (*b*) When is a tender of the amount good?

(18) (*a*) What kinds of personal property may be assigned? (*b*) Define assignment and mention the requisites of an assignment.

THE LAW OF WILLS

EXAMINATION QUESTIONS

(1) What is a will?

(2) Define (*a*) testator; (*b*) devisee; (*c*) legatee; (*d*) devise; (*e*) bequest.

(3) (*a*) What is a codicil? (*b*) For what is it used? (*c*) What is its effect on a will?

(4) What is the execution of a will?

(5) How many kinds of wills are there? Illustrate them.

(6) State the formal requisites of a will. Explain them.

(7) What is the effect of disregarding the statutory requisites?

(8) What is the difference between attestation and subscription? Define both terms.

(9) (*a*) What is a sufficient attestation? (*b*) Are subscribing witnesses required? (*c*) What is a good will in Pennsylvania?

(10) When should a will be read over and explained?

(11) By what law is the validity of a will governed?

(12) Is any special form of words necessary to the validity of a will?

(13) What special expression is it advisable to use?

(14) What are two essential requisites of a testamentary paper?

(15) May a will be made to take effect in the alternative?

(16) What special provisions are necessary (*a*) to give a life interest? (*b*) to give the income of the estate only? (*c*) to prevent the income from being liable for the debts of the devisee or legatee? (*d*) to exclude the husband? (*e*) to dispose of property over which the testator has a power of disposition only?

(17) What is the necessary subject-matter of a will?

(18) When is a will valid, though it makes no disposition of property?

(19) (*a*) Who may make a will? (*b*) Who may not?

(20) (*a*) To what extent may a testator dispose of his property by will? (*b*) What restrictions are imposed upon the power of a testator in this respect?

(21) (*a*) What is the revocation of a will? (*b*) When is revocation effectual, or ineffectual, and why?

(22) What is the republication of a will?

(23) (*a*) What is a joint will? (*b*) Are such wills revocable?

(24) What is a mutual will?

(25) (*a*) Of what may mutual wills consist? (*b*) Are such wills revocable?

(26) May a contract to make a will be enforced?

(27) May a lost will be proved?

(28) On whom does the burden of proving a lost will rest?

(29) Give examples (*a*) of an ordinary will; (*b*) of a will giving specific pieces of real estate to different parties; (*c*) of a will excluding the husband of a daughter from any interest in the property given to her.

THE LAW OF CONTRACTS

(PART 1)

EXAMINATION QUESTIONS

(1) Define the term contract, and state the essentials in the formation of a complete contract.

(2) What is the meaning (*a*) of obligation? (*b*) of agreement?

(3) Define an (*a*) executed contract; (*b*) executory contract; (*c*) express contract; (*d*) implied contract.

(4) State the leading principles of the law of offer and acceptance.

(5) What is (*a*) an option? (*b*) a call and put? (*c*) Explain what is meant by bids at auction.

(6) In what manner may an offer be made to the public at large? Illustrate.

(7) What formality is required in law for an acceptance?

(8) Illustrate how acceptance may be inferred from conduct; that is, from the acts of a party.

(9) When may an offer or an acceptance be withdrawn?

(10) Into what classes are contracts divided as to form? Describe them.

(11) What is the effect of agreements contemplating a formal written contract? Mention the exception.

(12) Explain memoranda of agreements.

(13) Why is a written contract to be preferred to an oral one?

(14) What is the effect of blanks left in a contract?

(15) Explain the effect on a contract of alterations—material and immaterial.

(16) Where a contract is partly printed and partly written and inconsistencies appear, which part governs?

(17) Define (*a*) a deed; (*b*) a merger; (*c*) an estoppel.

(18) Mention some exceptions to the rule that a seal imports consideration.

(19) State the rules regulating (*a*) signature; (*b*) attestation; (*c*) stamping; (*d*) delivery; (*e*) recording.

(20) Explain the distinction as to the effect of delivery in escrow of a sealed and unsealed contract.

(21) (*a*) What class of contracts rests on no positive agreement? (*b*) State how these contracts arise.

(22) Define (*a*) mistake of fact; (*b*) mistake of law; (*c*) duress.

(23) When does the law imply a contract in an express contract? Illustrate.

THE LAW OF CONTRACTS

(PART 2)

EXAMINATION QUESTIONS

(1) How many parties are necessary in the formation of a contract?

(2) (*a*) Define an infant. (*b*) What contracts of an infant are valid? (*c*) what void? (*d*) what voidable?

(3) Explain the term necessaries.

(4) State the rules of affirmance and disaffirmance of contracts by infants.

(5) (*a*) Can an insane person make a valid contract? (*b*) Are there any exceptions to the rule?

(6) (*a*) What is meant by a lucid interval? (*b*) mental weakness?

(7) Mention a class of persons whose status resembles that of lunatics.

(8) Define (*a*) an alien friend; (*b*) an alien enemy.

(9) Explain (*a*) the status of the Indian tribes in the United States; (*b*) how commerce with them is regulated; (*c*) the statute law as to contracting with them.

(10) Define a convict and state the effect on contracts of conviction.

(11) State, briefly, the powers to contract that are possessed by corporations.

(12) To make binding contracts, (*a*) when must corporations use a seal? (*b*) When may the seal be omitted?

(13) What is the doctrine of privity of contract? (*b*) Explain the rule in England. (*c*) Explain the rule in the United States.

(14) Define (*a*) novation; (*b*) subrogation; (*c*) assignment; (*d*) chose in action.

(15) (*a*) Are all interests in property assignable? (*b*) If not, state those that are and those that are not.

(16) State the general rule governing the rights of (*a*) an assignor; (*b*) an assignee; (*c*) a debtor.

(17) Enumerate the essentials of a valid assignment.

(18) Define (*a*) a joint contract; (*b*) a several contract; (*c*) a joint and several contract.

(19) What are the rules of construction that determine whether a contract be joint, several, or joint and several?

THE LAW OF CONTRACTS

(PART 3)

EXAMINATION QUESTIONS

(1) (*a*) Define consideration. (*b*) What is meant by consideration that is concurrent? (*c*) executory? (*d*) executed? (*e*) good? (*f*) valuable?

(2) State (*a*) the rule concerning consideration in reference to simple contracts; (*b*) the rule as to specialties.

(3) Define (*a*) *nudum pactum;* (*b*) insufficiency of consideration.

(4) (*a*) Will mutual promises to marry sustain each other? (*b*) Explain the basic principles.

(5) (*a*) What is requisite to make a promise for a promise consideration valuable? (*b*) What are such promises called?

(6) Why are compromises and forbearances sustained?

(7) Is moral influence a sufficient consideration for a promise?

(8) As to consideration, what is the effect of (*a*) inadequacy? (*b*) impossibility of performance? (*c*) illegality?

(9) What evidence is required to prove consideration?

(10) Define (*a*) want of consideration; (*b*) failure of consideration. (*c*) State the effect of each.

(11) What is meant by the subject-matter of a contract?

(12) Explain the necessity of certainty and completeness in contracts.

(13) Define conditions (*a*) precedent; (*b*) subsequent; (*c*) dependent.

(14) (*a*) When is a contract entire? (*b*) When severable?

(15) Define an alternative promise.

THE LAW OF CONTRACTS

(PART 4)

EXAMINATION QUESTIONS

(1) Explain mutuality of obligation and state the effect on a contract in which it does not exist. Illustrate.

(2) (*a*) What is meant by reality of consent? (*b*) In what ways does unreality of consent usually manifest itself?

(3) (*a*) Define mistake. (*b*) Into what classes is it divided? (*c*) Explain the effect of mistake.

(4) Define fraud and explain its concurrent elements.

(5) What remedies are available for an injured party where fraud exists?

(6) (*a*) Explain duress. (*b*) Into what classes is it divided? (*c*) Illustrate its operation.

(7) What is undue influence?

(8) What is the effect of undue influence on a contract?

(9) (*a*) What general principle governs the subject-matter of a contract? (*b*) Enumerate the three classes of unlawful agreements which fall under the operation of this rule.

(10) By what test is the legality of the subject-matter of a contract determined?

(11) (*a*) Are wagering contracts valid? (*b*) Sunday contracts? (*c*) Contracts contrary to morality?

(12) (*a*) What is understood by the phrase, public policy? (*b*) Give an illustration of a contract that is contrary to public policy because affecting the state; (*c*) because affecting individuals.

(13) Define (*a*) maintenance; (*b*) champerty.

(14) What do you understand by a contract in restraint of trade?

(15) State the general rule as to the effect of illegality of contracts and the maxim which expresses it.

(16) (*a*) State the substance of the English act known as the statute of frauds. (*b*) Why was it passed?

(17) What is included in the term (*a*) debt? (*b*) default? (*c*) miscarriage?

(18) Show the distinction between original and collateral promises.

(19) Define the term earnest.

(20) What memorandum is required by the statute of frauds?

THE LAW OF CONTRACTS

(PART 5)

EXAMINATION QUESTIONS

(1) Explain the necessity for the interpretation of contracts.

(2) State the three general rules of construction.

(3) Describe the effect of custom or usage in the interpretation of contracts.

(4) What is usage of trade?

(5) (*a*) Where there is conflict of laws, what law governs contracts? (*b*) State the general rule.

(6) (*a*) Define comity. (*b*) Is comity of sufficient efficacy to disturb the judicial machinery of a state? (*c*) Why?

(7) Enumerate the four general ways in which contracts may be discharged.

(8) Define (*a*) waiver; (*b*) rescission; (*c*) modification; (*d*) novation; (*e*) release; (*f*) accord and satisfaction.

(9) (*a*) Explain the doctrine of merger. (*b*) What alteration will discharge a contract? (*c*) What is the effect of bankruptcy?

(10) When will performance of a contract be excused?

(11) Define *vis major*.

(12) What rules govern performance of contracts in reference to (*a*) quantity? (*b*) place? (*c*) time? (*d*) payment? (*e*) tender? (*f*) impossibility?

(13) (*a*) Define breach. (*b*) State the three ways by which breach discharges a contract. Illustrate them.

(14) What questions are to be considered in connection with failure of performance?

(15) Explain the difference between independent and dependent promises.

(16) Upon breach, what remedies remain in favor of the injured party?

(17) (*a*) State the general principle underlying action for breach. (*b*) What is the difference between proximate and remote damages?

(18) Define (*a*) liquidated damages; (*b*) penalty.

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